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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No.

RALPH B. SHANK, Trustee for Nelson Bunker Hunt Trust Estate, *Petitioner,*

v.

FEDERAL POWER COMMISSION, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner prays that a writ of certiorari be issued to review the judgment of dismissal entered June 30, 1956 by the United States Court of Appeals for the Fifth Circuit (Cause No. 15,832) and the orders of the Federal Power Commission issued July 1, 1955 and July 8, 1955. The judgment dismissed Petitioner's petition to review and set aside orders of the Federal Power Commission issued July 1, 1955 and July 8, 1955, which purported to reject a previously accepted

rate schedule filing, to make Petitioner's sales subject to the rate schedules filed by another independent producer, to establish Petitioner's rates, to nullify Petitioner's contract rights, to render ineffective an initial rate schedule filing and to determine that Petitioner's sales were subject to Section 7(b) of the Natural Gas Act without according Petitioner due process of law.

OPINIONS BELOW

The orders of the Federal Power Commission (which were in the form of letters) issued July 1, 1955 and July 8, 1955 (R. pp. 269-70, 292-93) are not yet reported. The majority and dissenting opinions of the Court of Appeals are reported[1] at 236 F. 2d 830 and 785 (Ad. Sheets) and are printed in Appendix A, pages 1a-45a.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered June 30, 1956 (R. p. 517; Appendix A, p. 46a). Rehearing was denied August 21, (R. p. 534). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Section 19(b) of the Natural Gas Act.

QUESTIONS PRESENTED

1. Whether an order of the Federal Power Commission rejecting rate schedule filings, subjecting one independent producer's sales to the rate filings of another, and determining the applicability of

[1] The dissenting opinion of Judge Brown deals with other causes argued and decided at the same time. All such causes dealt with actions of the Federal Power Commission affecting "independent producers" of natural gas. The portion of such dissent entitled "ABANDONMENT CASES" is concerned specifically with this action. Other portions of the dissent have an important bearing on this action.

Sections 7(b) and 7(c) of the Natural Gas Act (15 U.S.C. §§ 717f(c), 717f(b)) and having the effect of nullifying contract rights and establishing rates, without notice and opportunity for hearing, is a reviewable order under Section 19(b) of the Natural Gas Act (15 U.S.C. § 717r(b)).

2. Whether Section 7(b) of the Natural Gas Act (15 U.S.C. § 717f(b)) is applicable to services of independent producers to natural gas companies subject to the jurisdiction of the Commission, or is limited to the abandonment of facilities subject to the jurisdiction of the Commission or service rendered by means of such facilities excluding production and gathering facilities.

3. Whether the Federal Power Commission has authority under Sections 4 and 5 of the Natural Gas Act (15 U.S.C. §§ 717c, 717d) to strike a rate schedule filing and to reject a rate schedule change which have the effect of establishing rates, nullifying contract rights, and subjecting one independent producer's sales to the rate schedules filed by another, without notice and opportunity for hearing.

STATUTES AND REGULATIONS INVOLVED

The statutory provisions involved are Sections 1(b), 4, 5, 7 and 19 of the Natural Gas Act (15 U.S.C. §§ 717, 717c, 717d, 717f, 717r), pertinent provisions of which are printed in Appendix B, pages 47a-53a. Also involved is Order No. 174-B of the Federal Power Commission, pertinent parts of which are printed in Appendix B, pages 53a-57a.

STATEMENT

Prior to and since this Court's decision in *Phillips Petroleum Company* v. *Wisconsin,* 347 U.S. 672, on June 7, 1954, Petitioner has been engaged in the sale of natural gas and is an independent producer of natural gas pursuant to regulations issued by the Commission to implement such decision. Petitioner is and was on June 7, 1954 the owner of working interests in two producing gas wells located in the Northeast Field, Starr County, Texas. Under Petitioner's contractual arrangements with Sun Oil Company (Sun), the operator of one of the gas wells and the operator of a gas processing plant where the gas from both wells is processed, Petitioner owns its production from such wells and has the right to take its gas production in kind. Such contractual arrangements permitted Sun, when Petitioner did not take its gas in kind, to market Petitioner's gas under certain conditions for Petitioner's account. Sun's authority to market Petitioner's gas was revokable by Petitioner at any time (R. pp. 100-101, 133-34).

On June 7, 1954, and on the date the Commission's regulations implementing the *Phillips* decision became effective, Petitioner's gas was being marketed by Sun pursuant to a contract dated September 24, 1947, as amended, between Sun and Transcontinental Pipe Line Corporation (Transco) pursuant to Petitioner's contractual arrangement with Sun. As such contract of September 24, 1947 and certain contracts between Sun and Petitioner contained the terms and conditions under which Petitioner was selling its gas to Transco, such documents were filed by Petitioner as its initial rate schedule and the Commission designated such contracts as Petitioner's FPC Gas Rate Schedule

No. 2 (R. pp. 8-279). Petitioner also filed an application for a certificate of public convenience and necessity to continue such sale (assigned Docket No. G-4558) (R. pp. 271-81).

On April 5, 1955 Petitioner, after notifying Sun and Transco that Petitioner was exercising the right to make a different disposition of Petitioner's gas, entered into a contract to sell the gas to Tennessee Gas Transmission Company (Tennessee) commencing July 15, 1955 (R. pp. 233-268). Thereafter Petitioner, on June 13, 1955, filed a notice of cancellation of Rate Schedule No. 2, effective July 15, 1955 (R. pp. 226-232), an amendment to its certificate application to request authority to make the sale to Transco only until July 15, 1955 (R. pp. 282-84), and a notice of withdrawal of such application to be effective July 15, 1955 (R. pp. 285-291). At the same time Petitioner filed its contract with Tennessee as a new rate schedule applicable to its proposed sale to Tennessee commencing July 15, 1955 (R. pp. 233-268) and an application for a certificate of public convenience and necessity covering such sale (assigned Docket No. G-9031) (R. pp. 326-333). By the order-letters of July 1, 1955 and July 8, 1955, the Commission (1) "accepted" the notice of termination of its rate schedule applicable to the Transco sale as a "notice of withdrawal" and thereby made Petitioner's sales to Transco subject to the rate schedule filing by Sun applicable to Sun's sales to Transco;[2] (2) "accepted" Petitioner's contract with Tennessee as Petitioner's FPC Gas Rate Schedule

[2] Petitioner advised the Commission by letter dated September 14, 1954, that no one was authorized to make filings with the Commission on Petitioner's behalf (R. pp. 321-2).

No. 4 *but effective* upon the date the Commission granted a certificate applicable to such sale (Docket No. G-9031); (3) decided, as supplemented by its letter-order of August 25, 1955 denying rehearing, that Section 7(b) of the Natural Gas Act was applicable to Petitioner's sale to Transco; and (4) rejected the notice of withdrawal of Petitioner's certificate application to sell to Transco (Docket No. G-4558). One reason assigned by the Commission for, in effect, striking Petitioner's FPC Gas Rate Schedule No. 2 was that Petitioner was not a signatory party to the basic Sun-Transco agreement of September 24, 1947, and therefore not a proper party to file rate schedules. The Commission's action is also predicated upon the conclusion that the cessation of the "service" to Transco and the sale of the same production to Tennessee was an abandonment subject to Section 7(b) of the Act (R. pp. 269-70, 292-93, 324-25).[3] Petitioner filed a timely application for

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[3] Certain events concerning these proceedings have occurred subsequent to the entry of the letter-orders of July 1, 1955 and July 8, 1955 which were brought to the Court of Appeal's attention by the Commission's motion to dismiss, Petitioner's reply and the Petition for Rehearing to the Court (R. pp. 379-463, 518-33). Petitioner respectfully requests the Court to consider these matters, and believes they are relevant and material and necessary for considering this petition. The Commission designated the applications in Dockets G-4558 and G-3031 for hearing on January 4, 1956. At such hearing Petitioner asked the proceeding to be abated because of the pendency of petition to review filed by Petitioner. The Presiding Examiner refused to abate the proceeding and such decision was affirmed by the Commission's order issued January 25, 1956, which specifically provided "Any questions regarding treatment of Applicant's rate schedules are not at issue in this proceeding" (R. p. 417). Petitioner made a factual showing in that hearing of its operations including the facilities used in making the sales. In an order issued June 14, 1956, affirming the Presiding Examiner's decision, the Commission dismissed the application in Docket No. G-4558 be-

rehearing with the Commission and a timely petition for review in the Circuit Court of Appeals for the Fifth Circuit (Cause No. 15,832) (R. pp. 5-6, 294-322). After hearing, the Court entered its judgment on June 30, 1956 dismissing the petition on the sole ground that the orders of July 1, 1955 and July 8, 1955 were not reviewable and the Court did not consider the case on its merits (App. A, pp. 1a-45a; R. pp. 465-516). Petitioner filed a timely petition for rehearing which was denied on August 21, 1956 (R. p. 534).

REASONS FOR GRANTING WRIT

1. The orders issued by the Commission on July 1, 1955 and July 8, 1955 are reviewable orders. Such orders, entered without notice and opportunity for hearing, decided, and the specific final action taken with regard to rate matters was based on that decision, that Section 7(b) of the Natural Gas Act is applicable to Petitioner's sales to Transco.[4] Orders containing

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cause Petitioner is not a signatory party to the basic contract (i.e., the contract dated September 24, 1947, between Sun and Transco) which is the same reason given for striking Petitioner's FPC rate schedule No. 2; and dismissed the proceedings in Docket No. G-9031 to sell to Tennessee because Petitioner had not obtained prior approval of the Commission to abandon the sale to Transco. In essence, the further administrative proceeding confirmed the orders of July 1, 1955 and July 8, 1955 without any findings whatever concerning the facilities used by Petitioner in making its present or proposed sale. The formal findings of the decision of the Presiding Examiner in Dockets Nos. G-4558 (insofar as it relates to the instant matter) and G-9031, which were affirmed by the Commission's order of June 14, 1956, are printed in Appendix B, pages 57a-58a. Petitioner has filed a timely petition to review the Commission's order of June 14, 1956 in the Circuit Court of Appeals for the Fifth Circuit (Cause No. 16,322).

[4] For the reasons set forth on pages 12-14, *ante*, it is Petitioner's view that the Commission has erroneously construed Section 7(b).

an unequivocal assertion of power to regulate rates and services, as well as assertions of authority making a person subject to the general regulatory order of an administrative agency or the provisions of a regulatory act, are reviewable. *Panhandle Eastern Pipe Line Co.* v. *P.S.C.*, 332 U.S. 507, 511-12; *Rochester Telephone Co.* v. *F.C.C.*, 307 U.S. 125, 143-4; *Jersey City Power & Light Co.* v. *F.P.C.*, 129 F. 2d 183, 189, 191, affirmed 319 U.S. 61.

The orders of July 1, 1955 and July 8, 1955 have the immediate and definitive effect of denying Petitioner the right, under its contractual arrangements with Sun which were filed as Petitioner's rate schedule, to terminate the sale to Transco and of depriving Petitioner of the benefits of Petitioner's contract with Tennessee. Such orders have the further effect of fixing the prices for which Petitioner may sell natural gas. This Court's decision in *Powell* v. *U. S.*, 300 U.S. 276, 285, clearly sets forth that the substance and effect of an order striking a tariff filing should determine its reviewability. The Commission has no authority retroactively to fix the rates since the entry of its orders. *F.P.C.* v. *Hope Natural Gas Co.*, 320 U.S. 591, 618; *Hope Natural Gas Co.* v. *F.P.C.*, 196 F. 2d 803, 805; rehearing denied 197 F. 2d 522; *State Corp. Comm. of Kans.* v. *F.P.C.*, 215 F. 2d 176, 183. The entry of the orders under the circumstances thus fixed with finality the prices Petitioner may collect for its gas. Moreover, the entry of a further order in this proceeding would not affect the finality of the prices fixed by such order for the intervening period. Cf. *Hope Natural Gas Company* v. *F.P.C.*, 196 F. 2d 803, 805; *Phillips Petroleum Co.* v. *F.P.C.*, 227 F. 2d 470, 475, *cert.* denied 350 U.S. 1005;

F.P.C. v. *Hope Natural Gas Co.*, 320 U.S. 591, 618. There can be no question under these circumstances that Petitioner will suffer irreparable injury by the entry of the orders.

The orders modify the provisions of Petitioner's contractual arrangements with Sun filed as Petitioner's initial rate schedule without according Petitioner the hearing required by Section 5(a) of the Act and without the finding as required by such section that such provisions are "unjust, unreasonable, unduly discriminatory, or preferential." *Colorado Interstate Gas Co.* v. *F.P.C.*, 142 F. 2d 943, 954, affirmed 324 U.S. 581; *Michigan Consolidated Gas Co.* v. *Panhandle Eastern Pipe Line Co.*, 226 F. 2d 60, 66, *cert.* denied 350 U.S. 987; *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332, 341. This Court's *Mobile* decision, in Petitioner's view, clearly sets forth that the Natural Gas Act does not purport to specify the terms or conditions under which the initial contract arrangements between independent producers and pipeline companies must be formulated or filed (350 U.S. at 338, 343, 345). The orders, striking Petitioner's rate schedule filing, purport to deny Petitioner even the right to file its own rate schedule. The rights of Petitioner with respect to the disposition of its gas, including the price for such gas, which were clearly preserved under its arrangements with Sun, constitute Petitioner's most valuable property right in such gas. Such orders deny to Petitioner the right to initiate changes in rate schedule filings. *United Gas Pipe Line Co.* v. *Mobile Gas Service Co.*, 350 U.S. 332, 341, 343. Such orders therefore finally determine Petitioner's legal rights for the period of its effectiveness and are thus review-

able. *Phillips Petroleum Co.* v. *F.P.C.*, 227 F. 2d 470, 474, *cert.* denied 350 U.S. 1005; *Atlantic Seaboard Corp.* v. *F.P.C.*, 201 F. 2d 568, 572; *Algonquin Gas Transmission Co.* v. *F.P.C.*, 201 F. 2d 334, 337-8. Review of the orders of July 1, 1955 and July 8, 1955 which have attached legal consequences is required to protect Petitioner from irreparable injury already caused Petitioner by the entry of such orders. *Columbia Broadcasting System* v. *U. S.*, 316 U.S. 407, 425. The orders of July 1, 1955 and July 8, 1955 clearly show that the Commission does not contemplate any further action with respect to rate matters and that its decision in this regard was based on its determination of the applicability of Section 7(b). Petitioner is not, therefore, attempting to obtain judicial review of a Commission assertion of jurisdiction in advance of hearing and order.[5]

As the orders are final for the foregoing purposes, Petitioner's failure to seek the present review of the order would have rendered review unavailable under the time limitations of Section 19(b) of the Act. *Louisville Gas & Electric Co.* v. *F.P.C.*, 129 F. 2d 126, 130, 131. Cf. *F.P.C.* v. *Colorado Interstate Gas Co.*, 348 U.S. 492, 498. Petitioner requested the Commission to grant rehearing with respect to the order as required by Section 19(a) of the Natural Gas Act. The average price of Petitioner's gas to Transco is 7.017964 cents per Mcf (R. p. 219). The price for

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[5] If this Court will consider the further proceedings in Dockets Nos. G-4558 and G-9031, as outlined in Footnote 3, pp. 6-7, it is there shown that the Commision took no further action with respect to the rate matters and merely confirmed its action in the certificate matters. Petitioner's brief (R. pp. 418-63) in such further proceedings requested detailed findings on both matters and shows the record included evidence on both matters.

Petitioner's gas under its Tennessee contract is 10 cents per Mcf for the period under review (R. p. 248). The Commission's orders here sought to be reviewed have already deprived Petitioner of the higher price for natural gas since July 15, 1955. Petitioner is therefore an aggrieved person within the meaning of Section 19(b) of the Natural Gas Act. *F.C.C.* v. *Sanders Bros.*, 309 U.S. 470, 476-7; *National Coal Assoc.* v. *F.P.C.*, 191 F. 2d 462.

The Court of Appeal's conclusion that the orders are not reviewable is in conflict with the decision of the Court of Appeals for the Third Circuit in *Mississippi River Fuel Corp.* v. *F.P.C.*, 202 F. 2d 899. In that case, which is discussed in some detail, *ante* page 15, the Court reviewed an order of the Commission rejecting a change in a tariff filing. In the instant matter, the Commission not only rejected a change in Petitioner's rate schedule filing but it purported to strike Petitioner's entire rate filing.

On the basis of *F.P.C.* v. *Metropolitan Edison Co.*, 304 U.S. 375, and *United Gas Pipe Line Co.* v. *F.P.C.*, 181 F. 2d 796, *cert.* denied 340 U.S. 827,[6] the Court below concluded that Section 19(b) "relates solely 'to orders of a definitive character dealing with the merits * * * and resulting from a hearing upon evidence and supported by findings appropriate to the case.' " As to the latter prerequisite, the Courts have consistently reviewed orders of the Commission as well

[6] The Court's main discussion of these cases is found in its decisions of *Magnolia Petroleum Co.* v. *F.P.C.*, 236 F. 2d 785, 791 (Ad. Sheets) and *Humble Oil & Ref. Co.* v. *F.P.C.*, 236 F. 2d 819, 822 (Ad. Sheets).

as other administrative agencies entered prior to hearing and findings based thereon. See *Phillips Petroleum Co.* v. *F.P.C.*, 227 F. 2d 470, 474, *cert.* denied 350 U.S. 1005; *Atlantic Seaboard Corp.* v. *F.P.C.*, 201 F. 2d 568, 572; *Algonquin Gas Transmission Co.* v. *F.P.C.*, 201 F. 2d 334, 337; *Mississippi River Fuel Corp.* v. *F.P.C.*, 202 F. 2d 899; *Isbrandtsen Co.* v. *U.S.*, 211 F. 2d 51, 55, *cert.* denied 347 U.S. 990. See also *American Telephone & Telegraph Company* v. *F.C.C.*, 299 U.S. 232; *American Broadcasting Co.* v. *F.C.C.*, 191 F. 2d 492; *Ashbacker Radio Corp.* v. *F.C.C.*, 326 U.S. 327. Although the Court of Appeals for the District of Columbia in *United Gas Pipe Line Co.* v. *F.P.C.*, 181 F. 2d 796, refused to review an order prescribing rules for filing tariffs, the Court's decision clearly suggests that a different result would have obtained had the rule resulted in a change in rates without according the hearing required by the Act. The *Metropolitan Edison* case, *supra*, clearly dealt with a procedural issue which had no immediate or substantial effect on the respondent and did not, in Petitioner's view, intend to restrict review in the manner decided by the lower Court. For the reasons hereinabove set forth, it is Petitioner's view that Petitioner has exhausted all the administrative remedies available and that *Myers* v. *Bethlehem Shipbuilders Corp.*, 303 U.S. 41, 50-51, cited by the Court below, is not controlling in determining the reviewability of the orders of July 1, 1955 and July 8, 1955.

2. The orders of July 1, 1955 and July 8, 1955, in Petitioner's view, are based on an erroneous interpretation of Section 7(b) of the Natural Gas Act. The plain and unambiguous language of Section 7(b)

and the legislative history[7] thereof clearly sets forth that Section 7(b) applies only when a natural gas company itself has "facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities." It thus is clear that Petitioner's right to discontinue its sale is dependent on whether its proposal involves the abandonment of "facilities subject to the jurisdiction of the Commission" or the abandonment of a "service" rendered by means of facilities subject to the jurisdiction of the Commission. The Commission's orders, particularly as supplemented by the letter-order denying rehearing, dated August 25, 1955, construe such section as being applicable to Petitioner's "service" to Transco without regard to whether that service is rendered by facilities subject to the jurisdiction of the Commission.

This Court's decisions in *Colorado Interstate Gas Co.* v. *F.P.C.*, 324 U.S. 581, 598; *Interstate Natural Gas Co.* v. *F.P.C.*, 331 U.S. 682, 690-1, and *F.P.C.* v. *Panhandle Eastern Pipe Line Co.*, 337 U.S. 498, clearly demonstrate that under Section 1(b) of the Act the Commission is precluded from controlling the activities of production or gathering of natural gas, including the production properties and gathering facilities. In the *Panhandle Eastern* case, this Court stated with respect to Section 1(b) of the Natural Gas Act:

> "In Colorado Interstate Gas Co. v. Federal Power Commission, 324 US 581, 603, 89 L ed 1206, 1223, 65 S Ct 829, we said that this phrase comprehended the producing properties and gather-

[7] The entire legislative history of Section 7(b) was reviewed in detail in Petitioner's brief filed in this cause in the Fifth Circuit (R. pp. 370-77).

ing facilities of a natural-gas company. We now adhere to this natural and clear meaning of the words and their obvious expression of congressional intent." (337 U.S. at 504)

Moreover, in such decision this Court decided that Section 7(b) of the Act was only applicable to "facilities subject to the jurisdiction of the Commission" by the following language:

> "The Federal Power Commission leans heavily upon § 7(b) which provides that no natural-gas company may abandon any of its facilities subject to the jurisdiction of the Commission without the prior approval of the Commission. The argument here is that since natural gas is the 'lifeblood' of a pipe-line system, a company by disposing of its gas reserves, unhampered by the Commission control, may render itself unable to continue service; consequently abandonment of facilities and service without the consent of the Commission will result. The argument begs the question. The section, like those above, covers only 'facilities subject to the jurisdiction of the Commission.'" (337 U.S. 508)

The decision of this Court in *Phillips Petroleum Co.* v. *Wisconsin,* 347 U.S. 672, 678, in Petitioner's view, reaffirmed its prior decisions in the *Panhandle Eastern* and *Colorado Interstate* cases, holding producing and gathering facilities are exempt from Commission jurisdiction. For the reasons herein expressed, it is Petitioner's view that the Commission has erroneously interpreted such section in deciding the instant matter.

3. The Commission's order exceeds its authority under Sections 4 and 5 of the Natural Gas Act and is

in conflict with the decision of the Circuit Court of Appeals for the Third Circuit in *Mississippi River Fuel Corp.* v. *F.P.C.*, 202 F. 2d 899. The Commission's authority under Section 4(e) to suspend price or other changes is conditioned upon its entering "upon a hearing concerning the lawfulness" thereof and giving reasons for its action (Section 4(e)). In the *Mississippi River Fuel Corp.* decision, *supra,* the Court pointed out that when changes are properly filed the Commission has two alternatives, (1) to allow the changes to become effective or (2) to enter "upon a hearing and, pending such hearing, could have suspended the proposed new schedule for a period not exceeding five months beyond the proposed effective date * * *." The Court further found the Commission "purported to follow a third course, rejection without hearing—a course for which it cannot show even color of statutory authority" (202 F. 2d at 902). Cf. *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332, 341. A hearing concerning the lawfulness of a rate schedule change would include the question whether Petitioner's sales could be discontinued because of Petitioner's alleged failure to comply with Section 7(b) of the Act.

Under the rate review authority of Section 5(a) of the Act, the Commission's authority is conditioned upon a finding after hearing that the rate or contract is "unjust, unreasonable, unduly discriminatory, or preferential." *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332, 341. It is thus Petitioner's view that the Commission's orders of July 1, 1955 and July 8, 1955 exceed its rate review authority under Sections 4 and 5. Moreover, it is Petitioner's position that Petitioner has been denied the right to

a hearing specifically required by Section 4(e) and 5(a) of the Act, and Section 5 of the Administrative Procedure Act (5 U.S.C. § 1004).

Sections 4(c) and 4(d) of the Natural Gas Act, which contain the requirements for filing rate schedules and changes, do not require that the natural gas company subject thereto be a signatory party to a contract setting forth the terms and conditions of the sale. The clear and explicit language of such sections, as well as other sections of the Act, require that the natural gas company subject to the Commission's jurisdiction must file its own rate schedules or do the other acts required. The Commission rules in effect at the time the Commission entered its orders permitted, but did not require, signatory parties to gas rate schedules to file on behalf of non-signatory parties (Section 154.91(b), App. B, pp. 54a). This Court's decision in *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332, 343, made it clear that the Natural Gas Act did not purport to affect a natural gas company's right "to establish *ex parte*, and change at will, the rates offered to prospective customers," subject to the Commission's power to review rates, and that the "initial rate-making and rate changing powers of natural gas companies remained undefined and unaffected by the Act." Such rights would include the right to file rate schedules and changes. There is no provision in Section 4 or 5 of the Act which permits or authorizes one independent producer or natural gas company to file gas rate schedules on behalf of another or to accept such a filing on its behalf. There is no provision in the Natural Gas Act which permits or authorizes the Commission to authorize or require one

independent producer or natural gas company to file gas rate schedules on behalf of another or to accept and sell its gas pursuant to the rate schedule filed by another independent producer or natural gas company. The assertions of jurisdiction in this case would include compliance with the rate filing requirements of the Natural Gas Act and subject Petitioner to penalties for failure to comply.

4. The questions presented are important in the administration of the Natural Gas Act and in the conservation of natural gas resources. As new sources of gas are developed, it is a common practice within the oil and gas industry to enter into short-term gas sales contracts or gas sales contracts providing for renegotiation—frequently at below general market prices for the gas—in order to conserve the gas during the development period. Pipeline companies are willing to take relatively small volumes under these conditions. If, as Petitioner contends in this proceeding, the Commission's decision that Section 7(b) is applicable to any sale is erroneous, it would seem that this practice may be continued. If, on the other hand, it is determined that the Commission's interpretation is correct, then producers and pipeline companies will likely negotiate for so-called "spot" and short-term purchases on an entirely different basis with the results that higher prices will obtain for any gas sold during the developmental period of a field and more gas will be wasted to the detriment of the ultimate consumer. It is Petitioner's belief that pipeline companies do not consider "spot" or short-term purchases as parts of their gas reserves to indicate the feasibility of a pipeline project. Such purchases do conserve the reserves and extend their lives. Furthermore, it

seems apparent that a pipeline company's gas reserves are protected and assured by its contractual arrangements with producers, and the construction the Commission has placed on Section 7(b) is not essential in this regard.

CONCLUSION

The Commission's orders of July 1, 1955 and July 8, 1955, entered without notice and opportunity for hearing, have had an immediate and substantive effect on Petitioner's legal and contract rights, established the prices which Petitioner has received for natural gas since July 15, 1955, subjected Petitioner's sales to the rate filings of another, and determined the applicability of Section 7(b) of the Natural Gas Act to Petitioner's "service." In Petitioner's view, the Commission has misconstrued the applicability of Section 7(b) and has ignored the plain language of such section and the decisions of this Court that the applicability of Section 7(b) is limited to "*facilities*" subject to the jurisdiction of the Commission or service rendered by such *facilities*. For the reasons expressed, it is clear that the orders exceed the Commission's authority under Sections 4 and 5 of the Act.

Accordingly, pursuant to Section 19(b) of the Natural Gas Act and Paragraph 1(b) of Rule 19 of the Rules of this Court, Petitioner prays that a writ of certiorari be granted.

Respectfully submitted,

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Certificate of Service

I certify that the foregoing Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit was served upon Respondent, the Federal Power Commission, by mailing a copy thereof, postage prepaid, to each of the following attorneys for Respondent on the 17th day of November, 1956:

J. Lee Rankin, Solicitor General
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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 15832

RALPH B. SHANK, TRUSTEE FOR NELSON BUNKER HUNT TRUST ESTATE, *Petitioner,*

versus

FEDERAL POWER COMMISSION, *Respondent.*

Petition for Review of Orders of the Federal Power Commission sitting at Washington, D. C.

(June 30, 1956.)

Before BORAH, RIVES and BROWN, Circuit Judges.

BORAH, Circuit Judge: Petitioner herein has invoked the jurisdiction of this Court under Section 19(b) of the Natural Gas Act to review two letter-orders of the Federal Power Commission dated July 1, 1955, and July 8, 1955, respectively.

The material facts are these: Petitioner has an interest in two producing gas wells in Starr County Texas, which it operates under joint operating and gas processing agreements with Sun Oil Company. Under these agreements,

Sun Oil gathers petitioner's gas into its field gathering system and runs it through its gas processing plant also located in Starr County. These agreements provide that during such time as petitioner fails to take or cause to be taken any portion of its residue gas, Sun Oil at its election may sell it for the account of petitioner, or may purchase such gas for its own account, or may refuse to receive or discontinue the receiving of petitioner's gas to the extent of its failure to take the residue gas. The agreements further provide that Sun Oil has at any time the right to exercise any one or more of said options. As of June 7, 1954, petitioner had failed to take or cause to be taken from the processing plant its residue gas and on that date Sun Oil was exercising its election to dispose of such gas along with its own, by selling it to Transcontinental Gas Pipeline Corporation at a price of approximately 7 cents per Mcf. pursuant to the terms of Sun Oil's gas sales contract with Transcontinental and subject to both petitioner's and Sun Oil's right to terminate such sales of petitioner's gas at will.

On June 7, 1954, the Supreme Court handed down its decision in *Phillips Petroleum Company* v. *Wisconsin*, 347 U. S. 672. Thereafter and as set forth at length in *Magnolia Petroleum Company* v. *Federal Power Commission*, No. 15320, this day decided, the Commission issued its series of 174-Orders in which it promulgated rules and regulations applicable to "independant producers"[1] of natural gas subject to the jurisdiction of the Commission. Among other things these rules and regulations prescribed that: (1) the terms and conditions of service and all rates and charges effective on and after June 7, 1954, for the

[1] The term "independent producer" was defined in the regulations, 18 C.F.R. §154.81, as "any person as defined in the Natural Gas Act who is engaged in the production or gathering of natural gas and who transports natural gas in interstate commerce or sells natural gas in interstate commerce for resale, but who is not primarily engaged in the operation of an interstate pipeline."

transportation and sale of natural gas in interstate commerce were to be set forth in a rate schedule to be filed with the Commission, and "rate schedule" was defined to mean "the basic contract and all supplements or agreements amendatory thereof, effective and applicable on and after June 7, 1954 . . ."; (2) no change in the June 7, 1954, rates may be made except after thirty days' notice to the Commission and subject to its right to suspend such change; (3) independent producers should apply to the Commission for certificates of public convenience and necessity covering the sale of such gas as is subject to the jurisdiction of the Commission; and (4) sales or services rendered by independent producers must be continued until termination was given the express approval of the Commission in accordance with Section 7(b) of the Act.

In compliance with these regulations, petitioner on October 15, 1954, and with jurisdictional reservations, filed with the Commission all of its contracts with Sun Oil which were effective on and after June 7, 1954, together with the existing contracts between Sun Oil and Transcontinental. In addition, petitioner with like jurisdictional reservations filed an application for a certificate of public convenience and necessity which included, *inter alia*, petitioner's sales of natural gas which were made to Transcontinental under the documents described above. Meanwhile, petitioner had negotiated a new contract to sell its residue gas to Tennessee Gas Transmission Company, beginning on July 15, 1955. And in view of the fact that its initial filings had not been acted upon by the Commission, petitioner on June 13, 1955, and with full reservation of its original jurisdictional objections, filed a "Notice of Withdrawal of Application for Initial Certificate of Public Convenience and Necessity, etc." insofar as it affected petitioner's previously filed rate schedule covering the sales of its gas by Sun Oil to Transcontinental. On the same day petitioner also filed an amendment to its application for initial certificate of public convenience and

necessity in which it requested that it be authorized to sell natural gas to Transcontinental until July 15, 1955, but not afterwards. Simultaneously with the filing of the partial withdrawal notice and the amendment to its application for initial certificate, petitioner also filed with the Commission the new contract with Tennessee Gas together with an application for an additional certificate of public convenience and necessity to cover its sale of residue gas from the processing plant to Tennessee Gas in accordance with the new gas sales contract.

Following the receipt of these supplemental filings, the Commission on July 1, 1955, and July 8, 1955, issued the two letter-orders sought to be reviewed herein. By the first order, the Commission rejected petitioner's request to withdraw a portion of its application for an initial certificate of public convenience and necessity and stated that the Commission considered it as a request for authority to abandon service under Section 7(d) [7(b)] of the Act. The Commission noted that petitioner's application for authority to sell natural gas to Tennessee Gas "involves the gas now sold to Transcontinental" and it requested petitioner to supplement its June 13, 1955, filing with evidence showing that the present or future public convenience and necessity permits the abandonment of sales to Transcontinental together with statements of position by Transcontinental and Tennessee Gas in regard to this abandonment. The second order, in material part, permitted petitioner to withdraw the previously filed rate schedule consisting of petitioner's agreements with Sun Oil and the latter's contracts with Transcontinental on the ground that petitioner was not a signatory party to the basic sales contract between Sun Oil and Transcontinental.

Agreeable to the provisions of Section 19(a) of the Natural Gas Act, petitioner duly applied for a rehearing of these orders, and thereafter the Commission by letter-order dated August 25, 1955, affirmed its previous action,

denied petitioner's request for rehearing and asserted that the above matters would be set for hearing as promptly as possible.[2]

Subsequent to the denial of its application for rehearing, petitioner filed the within petition for review, in which it attacks the lawfulness of the orders of July 1 and July 8, 1955, on numerous grounds which in brief it compresses into the following assignments of error:

"1. The Commission's orders violate the statutory scheme of rate making and rate changing prescribed by the Natural Gas Act, because such orders deprive Petitioner of the right to initiate rates and changes in rates.

"2. The Commission has no authority to prohibit Petitioner from terminating a sale of natural gas where none of its facilities are subject to the jurisdiction of the Commission and the sale is not rendered by means of any of its facilities subject to the jurisdiction of the Commission.

"3. Petitioner is not engaged in the sale *in* interstate commerce of natural gas for resale within the meaning of the Natural Gas Act.

"4. The Commission has no authority to require Petitioner to obtain a certificate of public convenience and necessity because petitioner does not engage in any transportation or sale of natural gas sub-

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[2] The letter-order set forth the following statement with respect to the Notice of Withdrawal dated June 13, 1955: "In view of your insistence that your pleading entitled "Notice of Withdrawal" (of a portion of your application in Docket No. G-4558) was not intended to be and should not be considered as a petition filed pursuant to Section 7(b) of the Natural Gas Act, we will not now consider it as such application. However, if the service to the Transcontinental Gas Pipe Line Corporation, which is the subject matter of the proceeding at Docket No. G-4558, is to be abandoned, it will be necessary for you to file a petition to abandon such service in accordance with Section 7(b) of the Natural Gas Act. Rejection of your Notice of Withdrawal is affirmed."

ject to the jurisdiction of the Commission nor does it have any facilities subject to the jurisdiction of the Commission.

"5. The Commission has no authority to suspend the effectiveness of Petitioner's initial rate schedule filing to sell natural gas to Tennessee Gas Transmission Company without notice, hearing and findings."

On December 2, 1955, and in compliance with the requirements of Section 19(b) of the Natural Gas Act the Commission certified to this Court a transcript of the record. Five days thereafter it notified petitioner that a formal hearing would be held on January 4, 1956, concerning the matters involved and the issues presented by petitioner's aforementioned applications. On the day fixed for hearing petitioner moved that the proceeding be abated and stayed pending final disposition of this petition for review. The presiding examiner in turn certified the motion to the Commission for decision but refused to recess the hearing and the hearing was had and completed on the following day. Thereafter in due course the petitioner's motion was denied by the Commission. Following this action the Commission filed a motion to dismiss the petition for review on the ground that the issues raised therein are the same as some of those involved in the proceedings now pending before the Commission. In support of its motion the Commission vigorously insists that petitioner is prematurely seeking a judicial review without having first exhausted its administrative remedy and that by resorting to this Court before the Commission had set the date for hearing and prior to its decision and the issuance of a definitive order in the pending proceedings before it, petitioner is attempting to substitute this Court for the Commission as the tribunal to hear and determine what Congress declared the Commission should hear and determine in the first instance. Petitioner on the other hand contends that the motion to dismiss is based upon

facts not appearing in the certified record and that the Commission, having certified the record, may not oust this Court of the exclusive jurisdiction vested in it under Section 19(b) of the Act.[3]

Thus, the questions presented by the petition for review and the motion to dismiss include the reviewability and, if reviewable, the validity of the Commission's orders. The question of reviewability necessarily involves a determination of whether we have jurisdiction to review such orders under Section 19(b) of the Natural Gas Act, which section clearly specifies when the jurisdiction of this Court may attach and to what extent that jurisdiction may be exercised. In *Magnolia Petroleum Company* v. *Federal Power Commission, supra,* we observed that this provision of the Act contemplates a review by this Court of definitive orders entered after hearing and upon completion of the administrative process, and the test of reviewability there enunciated is controlling here.

Applying this test to the issues presented, we think it plain that these orders are in no proper sense definitive orders as contemplated by Section 19(b), but they are instead mere procedural steps taken at the inception of and not upon the completion of the administrative process. All that the Commission did in the exercise of its regulatory jurisdiction was to enter preliminary, interlocutory orders which do not bear upon the merits of the controverted fundamental issues which must ultimately be adjudicated by the Commission. The review provisions of Section 19(b) should not be construed as authorizing review of every order that the Commission may make albeit of a mere procedural character, for, as was so clearly stated by the Supreme Court in speaking of a like review provision of the Federal Power Act, "Such a con-

[3] "Upon the filing of such transcript such [Court of Appeals] shall have exclusive jurisdiction to affirm, modify, and set aside such order in whole or in part." Section 19(b), Natural Gas Act.

struction, affording opportunity for constant delays in the course of the administrative proceeding for the purpose of reviewing mere procedural requirements or interlocutory directions would do violence to the manifest purpose of the provision." *Federal Power Commission* v. *Metropolitan Edison Co.*, 304 U. S. 375, 383-384.

The petitioner is thus before this Court without a record, without a single established fact or finding, and without evidence, asking us to exercise our power of review when, in fact, there is no "order" to review. This being the situation, it is plain that petitioner is prematurely seeking review of the Commission's action without having first exhausted the prescribed administrative remedy. *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50-51. This case thus falls squarely within the well established rule which requires that there be no judicial intervention until administrative action has reached its complete development. *Aircraft & Diesel Corp.* v. *Hirsch*, 331 U.S. 752, 767; *Union Oil Company, et al.*, v. *Federal Power Commission*, No. 15,461, decided this day.

The conclusion we have reached that this Court has no jurisdiction to review these orders at this time renders it both inappropriate and unnecessary to pass upon the other questions raised by petitioner's assignments of error. Accordingly, the petition must be and the same is hereby dismissed.

BROWN, Circuit Judge, dissenting.

A True Copy:
Teste:
(SEAL)

JOHN A. FEEHAN, JR., *Clerk*

By /s/ CLARA R. JAMES
Deputy
Clerk of the United States Court of Appeals for the Fifth Circuit

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 15,320

MAGNOLIA PETROLEUM COMPANY, *Petitioner,*

v.

FEDERAL POWER COMMISSION, *Respondent.*

No. 15,321

THE OHIO OIL COMPANY, *Petitioner,*

v.

FEDERAL POWER COMMISSION, *Respondent.*

No. 15,352

THE SUPERIOR OIL COMPANY, *Petitioner,*

v.

FEDERAL POWER COMMISSION, *Respondent.*

No. 15,354

WESLEY WEST, *Petitioner,*

v.

FEDERAL POWER COMMISSION, *Respondent.*

No. 15,471

GULF OIL CORPORATION AND GULF REFINING COMPANY, *Petitioners,*

v.

FEDERAL POWER COMMISSION, *Respondent.*

No. 15,470

THE TEXAS COMPANY, *Petitioner,*

v.

FEDERAL POWER COMMISSION, *Respondent.*

No. 15,461

UNION OIL COMPANY OF CALIFORNIA AND LOUISIANA LAND AND EXPLORATION COMPANY, *Petitioners,*

v.

FEDERAL POWER COMMISSION, *Respondent.*

No. 15,704

HUMBLE OIL & REFINING COMPANY, *Petitioner,*

v.

FEDERAL POWER COMMISSION, *Respondent.*

No. 15,627

STANOLIND OIL & GAS COMPANY, ET. AL., *Petitioners,*

v.

FEDERAL POWER COMMISSION, *Respondent.*

No. 15,678

CONTINENTAL OIL COMPANY, *Petitioner,*

v.

FEDERAL POWER COMMISSION, *Respondent.*

No. 15,799

HUNT OIL COMPANY, *Petitioner,*

v.

FEDERAL POWER COMMISSION, *Respondent.*

No. 15,928

HUNT OIL COMPANY, *Petitioner,*

v.

FEDERAL POWER COMMISSION, *Respondent.*

No. 15,832

RALPH B. SHANK, TRUSTEE FOR NELSON BUNKER HUNT TRUST ESTATE, *Petitioner,*

v.

FEDERAL POWER COMMISSION, *Respondent.*

No. 15,749

ROY LEE, TRUSTEE FOR HASSIE HUNT TRUST, *Petitioner,*

v.

FEDERAL POWER COMMISSION, *Respondent.*

No. 15,706 through No. 15,721
(16 cases)

CONTINENTAL OIL COMPANY, *Petitioner,*

v.

FEDERAL POWER COMMISSION, *Respondent.*

[*Petitions for Review of Certain Orders of the Federal Power Commission Sitting at Washington, D. C.*]

(June 30, 1956)

Before BORAH, RIVES and BROWN, Circuit Judges.

BROWN, Circuit Judge, dissenting:

It is with the greatest of deference that I feel myself under the overpowering compulsion of dissenting from my Brothers in these important and carefully considered cases. My differences are deep and fundamental and rest not at all upon a criticism of these opinions which, with articulate craftsmanship, fairly and honestly set forth the principal facts and expound the contentions. It is my view that these decisions are too much the product of an excision under the artificial sterility of a laboratory test with inadequate regard for the realities. They have absorbed too completely the recurrent plea of the Commission

that these cases are not to be reviewed "in a vacuum"—a figure with which I am in agreement as an aid to analysis. A vacuum is to be avoided because a vacuum lacks air, that is, the oxygen, life-giving qualities of facts and actuality. Differing not in the least on the need for oxygen (facts), it is my view that it is the Court, not these records, which has cut itself off from the abundant supply. For it is not only air which we need and which we have, but gas.

We have been thrice-told, *Columbia Broadcasting System* v. *United States*, 316 U.S. 407, 86 L.Ed. 1563; *Frozen Food Express* v. *United States*, — U.S. —, — L.Ed. — [Nos. 158-161, October Term 1955, April 23, 1956]; *United States* v. *Storer Broadcasting Company*, — U.S. —, — L.Ed. — [No. 94, October Term 1955, May 21, 1956], that as the heavy hand of Government descends upon citizen or business, the Court need not, in its sheltered retirement, divorce itself from knowledge of life as though it were something profane or permit Government administrators, with their inevitable parochial provincialism, to determine the nature of the activity being scrutinized through the theoretical notions conceived or contemplated in some monolithic redoubt.

It therefore seems remarkable to me that in thirty-six cases argued over a week's time presenting nearly every situation confronting the gas industry, the Court finds that not a single one is reviewable.[1] This is done, variously

[1] If our decisions and Amerada Petroleum Corporation v. Federal Power Commission, 10 Cir., 231 F. 2d 461, stand, there is no review of these substantial questions in sight, for Federal Power Commission v. Union Producing Company, D.C. Cir., 230 F. 2d 36; Gulf Oil Corporation v. Federal Power Commission, D. C. Cir. 230 F. 2d 40, foreclose the equity injunction. During the four days' argument of these cases, I vainly sought from anyone or all of the battery of advocates for the Commission, even a hypothetical situation in which *some* gas producer involved in *some* situation could have *some* significant review. Apparently some slight character of "review" is given to the State Tax Escalation Cases

stated, on the ground that none of these actions by the Commission is a definitive "Order" having requisite compulsory characteristics.

In my view that comes about from the theoretical approach which does not adequately reckon with the practical everyday processes of the gas industry in its numerous phases, and an appraisal of the impact of these administrative actions in the light of realistic actuality. I think an examination of all these cases in their major categories will demonstrate the practical decisive business consequences of these actions and, from the standpoint of the technical ripeness or sufficiency of a given case for present review, consideration of all will indicate clearly the existence of at least one case in which *each* significant point is adequately presented. In this analysis[2] and exposition, I approach each case from the standpoint of the basic question of reviewability and decline to find some

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(note 2, infra), but in the setting of the approach of nonreviewability in the fundamental jurisdictional situations and the complete bypassing of those problems (though present) in this one group, it indicates to me that in fact no review is really recognized even there.

[2] For convenience I group and refer to the cases in these categories: I. Order No. 174 Cases: No. 15320, Magnolia Petroleum Company; No. 15321, The Ohio Oil Company; No. 15352, The Superior Oil Company; No. 15354, Wesley West; No. 15471, Gulf Oil Corporation, Golf Refining Company; No. 15470, The Texas Company; No. 15461, Union Oil Company of California, Louisiana Land and Exploration Company. II. Suspension Cases: No. 15704, Humble Oil & Refining Company; No. 15627, Stanolind Oil & Gas Company; No. 15678, Continental Oil Company; No. 15799, Hunt Oil Company; No. 15928, Hunt Oil Company; No. 15461, Union Oil Company of California, Louisiana Land and Exploration Company. III. Abandonment Cases: No. 15832, Shank, Trustee; No. 14749, Roy Lee, Trustee. IV. State Tax Escalation Cases: Nos. 15706 through 15721, Continental Oil Company.

This division is for convenient, orderly presentation, but the entire opinion applies to all of the cases without regard to topical or category subdivisions.

way, either on the indicated merits or some procedural aspect, to deny review. When the Court is so overwhelmingly committed to a philosophy of nonreviewability that should be, and is, the point of our departure. As I adhere to this approach, comments or statements may frequently appear in which the merits of a particular contention are assayed. These are not to be understood as a variance from my method. They are put forward not to reflect either tentative, or final conclusions, a *pre* or partial judgment on them. They are put forward solely to put flesh on these bones, to show the vital impact of agency action and the existence of substantial, serious, frequently difficult questions.

The Standard of Reviewability

At the outset it is plain that, contrary to my Brothers, I find in *Columbia*[3] *Broadcasting System, Inc. v. United*

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[3] "The ultimate test of reviewability is not to be found in an overrefined technique, but in the need of the review to protect from the irreparable injury threatened in the exceptional case by administrative rulings which attach legal consequences to action taken in advance of other hearings and adjudications that may follow, the results of which the regulations purport to control." Columbia Broadcasting System, Inc. v. United States, supra, at 316 U.S. 425, 86 L. Ed. 1575. "The regulations here prescribe rules which govern the contractual relationships between the stations and the networks. • • • The regulations are not any the less reviewable because their promulgation did not operate of their force to deny or cancel a license. It is enough that failure to comply with them penalizes licensees, and appellant, with whom they contract." *Id.* at 316 U.S. 417, 86 L. Ed. 1571. "Here the Commission exercised its rule-making power by adopting regulations whose operation is not made subject to future administrative determinations, save only as the Commission may be called on to decide in any given case whether a station's contract with a network is within the regulations. The regulations' applicability to all who are within their terms does not depend upon future administrative action. Instead, they operate to control such action and to determine in advance the rights of others affected by it. • • •" *Id.* at 316 U.S. 420, 86 L. Ed. 1573.

Federal Communications Com. v. American Broadcasting Co.,

States, supra, ample basis for reviewability where regulations thought to be of far-reaching and perhaps devastating effect are yet couched in general terms and directed against no party in particular. Indeed, the presence in the Natural Gas Act[4] of substantial penalties for violation of the regulations brings these cases within the pre-*Columbia* law.[5]

Any lingering doubts must have evaporated with *Frozen Food Express v. United States, supra.* These regulations were surprisingly similar to those involved here. It was an *Ex Parte* proceeding, with the report, seventy-one pages

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347 U.S. 284, 98 L. Ed. 699, reviewed and enjoined similar general regulations applicable to all. See also, Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 95 L. Ed. 817.

[4] Section 21(b) (15 USCA 717t(b)): "Any person who wilfully and knowingly violates any rule, *regulation,* restriction, condition, or order made or imposed by the Commission under authority of this act, shall, *in addition* to any other penalties provided by law, be punished upon conviction thereof by a fine of not exceeding $500.00 for *each* and every *day* during which such offense occurs." [italics mine]

[5] Mr. Justice Frankfurter's dissent in *Columbia,* supra, 316 U.S. 429, 433, 434, 86 L. Ed. 1577, 1580, characterized the prior cases of reviewability, "In each one the force of the law either through criminal prosecution or injunction or fine or some other judicial remedy could immediately be brought to bear to enforce the command of the administrative agency." His comment analyzing United States v. Berwind-White Coal Mining Co., 274 U.S. 564, 71 L. Ed. 1204, as well as the other cases, United States v. Baltimore & Ohio Railroad Co., 293 U.S. 454, 79 L. Ed. 587; American Telephone & Telegraph Co. v. United States, 299 U.S. 232, 81 L. Ed. 142; Interstate Commerce Commission v. Goodrich Transit Co., 224 U.S. 194, 56 L. Ed. 729; Chicago, R. I. & P. R. Co. v. United States, 284 U.S. 80, 76 L. Ed. 177; Rochester Telephone Corp. v. United States, 307 U.S. 125, 83 L. Ed. 1147, involving specific penalties for violation of regulations, is significant: "Since the order of the Commission commanded carriers to take specified actions, and since the failure to comply with the order would bring immediate legal sanctions, the order was held reviewable." *Id.* at 316 U.S. 334-336, 86 L. Ed. 1580, 1581.

in length, listing specific items determined by the Interstate Commerce Commission to be within the agricultural commodity exemption of Section 203(b)(6), 49 USCA 303(b)(6). Reversing a three-judge holding of nonreviewability on the rubric of *United States v. Los Angeles Railroad Co.*, 273 U.S. 299, 71 L.Ed. 651, the Court sustained reviewability since, "The determination by the Commission that a commodity is not an exempt agricultural product has an immediate and practical impact on carriers who are transporting the commodities, and on shippers as well. * * * The determination made by the Commission is not therefore abstract, theoretical, or academic. * * * The 'order' of the Commission which classifies commodities as exempt or nonexempt is, indeed, the basis for carriers in ordering and arranging their affairs. * * * Carriers who are without the appropriate certificate or permit, because they believe they carry exempt commodities, run civil and criminal risks. * * * Carriers and shippers alike are told that they are or are not free to bargain for rates, that they must or must not pay the filed charges. The 'Order' of the Commission is in substance a 'declaratory' one * * * 5 USC 1004(d) which touches vital interests of carriers and shippers alike and sets the standard for shaping the manner in which an important segment of the trucking business will be done. * * *"

And *Frozen Food* was followed shortly by Storer Broadcasting Company, *supra*, holding general regulations determining eligibility for TV station licenses were orders reviewable at the suit of one in that business prior to the denial of a specific license application for, the Court said, "The Rules now operate to control the business affairs of Storer. * * * Storer cannot cogently plan its present or future operations. * * * These are grievances presently restricting Storer's operations." The *Columbia*[6] doctrine

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[6] The key to the majority's misreading of *Columbia* is found, I think, in the preoccupation in the Magnolia opinion (No. 15320)

has an expansive vitality to require that Courts view these matters in the light of a living world.

I.

Order 174 Cases

A consideration of but a few parts of Orders 174 A or B will demonstrate, I think, that the action of the Com-

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with some supposed peculiar difference between a Section 402(a) (Title 47 USCA 402) Urgent Deficiences Act, (October 22, 1913, 38 St. L. 208, 219, Chap. 32) and a Section 402(b) review which, for all practical purposes, is the same as Section 19(b) here. Significantly, Mr. Justice Frankfurter in his *Columbia* dissent completely ignored that point and in neither of the dissents in *Frozen Food Express* or *Storer* is it even mentioned as a valid basis for distinction. In *Storer*, of course, it was our precise situation—a statutory review by the Court of Appeals. In 402(a) and (b) and in 19(b), the requirement of an "Order" and the basis for reviewability is substantially the same. Scripps Howard Radio, Inc. v. Federal Communication Commission, 316 U.S. 4, 15, 16, 86 L. Ed. 1229, 1237, "It is urged that the orders reviewable under § 402(a) * * * are intrinsically different from those reviewable under § 402(b). But while the two sections route appeals to different courts, the differentiation was in large measure the product of Congressional solicitude for the convenience of litigants. It had no relation to the scope of the judicial function which the courts were called upon to perform * * * As the legislative history of the Act plainly shows, Congress provided the two roads to judicial review only to save a licensee the inconvenience of litigating and appeal in Washington * * *." See also, Philadelphia Co. v. S.E.C., D.C. Cir., 164 F. 2d 889 at 897, cert. den. 333 U.S. 828, 92 L. Ed. 1114, subsequent proceedings, 175 F. 2d 808, reversed as moot 337 U.S. 901, 93 L. Ed. 1715.

Amshoff v. United States, 7 Cir., 228 F. 2d 261, cert. den. 24 L.W. 3309, May 21, 1956, under the Hobbs Act, 5 USCA 1031, likewise reviewed, over the Administrator's contention that no definitive order had been entered, a general regulation which had the effect (as does much of the 174 Orders here) of repudiating an old and adopting a new administrative substantive policy.

The majority's emphasis (Magnolia 15320) on the requirement for, "A transcript of the record upon which the order complained of was entered" and the usual situation of an order, "of a defini-

mission has tremendous practical, direct business consequences on those who produce natural gas.

The Order Determines Who Is Subject to the Act

When it is recalled that the whole sweep of the 174 Orders is to outline action to be taken by those brought under the Act by the Phillips decision, the definition[7] of "Independent Producer" has a positive and practical effect on the industry. This is so because it is the imprimatur of the Commission itself on the Phillips decision and, more so, it is one of doubtful validity. The doubt arises because the definition comprehends all those engaged in the production or gathering of gas who sell it in interstate commerce for resale. By its terms no distinction is made between those who sell *before* and those who sell *after* the production and gathering is completed. The regulation

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tive character dealing with the merits of a proceeding before the Commission and resulting from a hearing upon evidence and supported by findings appropriate to the case, Federal Power Commission v. Metropolitan Edison Co., 304 U.S. 375 * * *" cannot, by a boot-strap-lifting process, defeat reviewability. The absence of a hearing, the receipt of evidence, the making of findings which is the very basis of much of the attack cannot thus be turned into a deficiency making it unreviewable, National Coal Association v. Federal Power Com., D.C. Cir., 191 F. 2d 462, 466; Saxton Coal Mining Co. v. National Bituminous Coal Comm., D.C. Cir., 96 F. 2d 517; American Sumatra Tobacco Corp. v. S.E.C., D.C. Cir., 93 F. 2d 236; Philadelphia Co. v. S.E.C., supra; see also, Columbia Oil and Gasoline Corp. v. S.E.C., 3 Cir., 134 F. 2d 265, 267. And, of course, where validity of regulation presents question of law on the face of the orders or regulations a "record" of evidence is not needed, see discussion of cases under II, Suspension Cases, infra.

[7] § 154.91 " 'Independent producer' as that term is used in these Rules means any person as defined in the Natural Gas Act who is *engaged in the production or gathering of natural gas* and who transports natural gas in interstate commerce *or sells* natural gas *in interstate commerce for resale*, but who is not primarily engaged in the operation of an interstate pipeline." [Italics mine]

therefore reflects the Administrator's interpretation[8] of an opinion which is, or may be, read much differently by others.

Whatever else the Court meant to say or do, it seems plain to me that the Court was being careful to point out that sales made during production or gathering were not within the scope of the decision:

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[8] Original Order 174 in the prefatory portions stated: "The decision of the United States Supreme Court on June 7, 1954, in Phillips Petroleum Company v. Wisconsin et al (347 U.S. 672) holds that persons engaged in the production and gathering of natural gas but which also transport natural gas in interstate commerce or make sales in interstate commerce for resale are 'natural gas companies' subject to all the requirements of the Natural Gas Act. * * *"

In the Commission's brief in No. 15471, Gulf Oil Corporation, pages 1 to 3: "* * * These orders [174] stem directly from the decision of the Supreme Court in Phillips Petroleum Co. v. Wisconsin * * * in which that court held that the Commission has jurisdiction over independent producers which engage 'in "the sale in interstate commerce of natural gas for resale," and that such a company' is a '"natural gas company" within the meaning of that term as defined in the Natural Gas Act' (p. 677). By these orders the Commission * * * promulgated general rules and regulations to be applicable to natural-gas companies which were also independent producers subject to Commission jurisdiction under the Act. * * * * * * the Supreme Court held in Phillips Petroleum Co. v. Wisconsin, * * * that sales in interstate commerce for resale by producers and gatherers to interstate pipeline companies do not come within the 'production or gathering' exemption, but that producers and gatherers making such sales also are 'natural-gas companies' under the Act, and the Commission has the authority to regulate such sales."

The Commission's brief in Magnolia No. 15320, page 4: "* * * the Supreme Court on June 7, 1954, held that the Commission had jurisdiction over sales of natural gas in interstate commerce for resale, including such sales in the area of production and gathering * * *."

This "extreme" view of the Phillips decision was successfully pressed by the Commission in Federal Power Com. v. J. M. Huber, D.N.J., 133 Fed. Supp. 479 (now on appeal Third Circuit).

"* * * production and gathering in the sense that those terms are used in Section 1(b), end before the sales by Phillips occur." 347 U.S. at 678, 98 L.Ed. at 1045.

Nothing in that opinion[9] impairs the authority of its prior holdings that Section 1(b) "* * * precludes the Commission from any control over the activity of producing or gathering natural gas", *Colorado Interstate Gas Company* v. *Federal Power Commission,* 324 U.S. 581, 603, 89 L.Ed. 1206, 1223; that the Commission has no power "* * * to regulate the physical production and gathering of natural gas in the interests of conservation or of any other consideration of legitimate local concern", *Interstate Natural Gas Company* v. *Federal Power Commission,* 331 U.S. 682, 690, 91 L.Ed. 1742, 1748; that the regulations of the Commission may not be "* * * inconsistent with the exercise by [the states] * * * of the powers over production and gathering of natural gas reserved to it by Congress in § 1(b) of the Act", Id. at 331 U.S. 691, 91 L.Ed. 1748.

It is because of the genuine and reasonable basis for difference in the interpretation of the Phillips opinion that the regulatory definition has such an impact. Until there

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[9] In the Phillips case (347 U.S. at 678, 98 L. Ed. at 1045-1046), the court reaffirms the previous cases on Section 1(b): "In Federal Power Commission v. Panhandle Eastern Pipeline Co., 337 U.S. 498, * * * we observed that the 'natural and clear meaning' of the phrase 'production or gathering of natural gas' is that it encompasses 'the production properties and gathering facilities of a natural gas company'. Similarly in Colorado Interstate Gas Co. v. Federal Power Com., 324 U.S. 581, 598 * * * we stated that "[t]ransportation and sale do not include production or gathering', and indicated that the 'production or gathering' exemption applies to the physical activities, facilities, and properties used in the production and gathering of natural gas. *Id.* 324 U.S. at 602, 603. See also, Federal Power Com. v. Hope Natural Gas Co., 320 U.S. 591, 612-615, 88 L. Ed. 333, 350-352 * * *; Peoples Natural Gas Co. v. Federal Power Com., 75 App. D.C. 235, 127 F. 2d 153; cf. United States v. Public Utilities Com., 345 U.S. 295, 307-311, 97 L. Ed. 1020 * * *."

was an administrative definition describing those persons who would come within the meaning of the Phillips decision, it would be a matter of individual interpretation. Even though it were ultimately determined by subsequent proceedings that such interpretation was the correct one, no one in the interim could have been subjected to penalties for the violation of a regulation (since none existed) and the continued reasonable doubt about the interpretation itself would prevent the severe penalties for a criminal violation under Section 21(a), 15 USCA 717t (a).

But with the definition by regulation, all of that is removed. All that is left now for the individual is the ultimate validity of that definition. By force of this definition, one who produces natural gas and sells it for resale in interstate commerce is conscious that he is then subject to the Act and must conform all of his activities to it and must take the specific action which other sections of the Order command. I shall show in subsequent detail what these are, but even without this, it is completely unrealistic to say that profound consequences are not imposed when the Order, at its outset, transmutes, for example, the owner of the working interest in a small gas well from a simple entrepreneur into a quasi public utility. Like the trucker who hauled grapefruit and seeks frozen chickens to eliminate a dead haul, cf. *Frozen Foods, supra,* this act of Government has changed his whole economic life.

The Order Requires Filing of Rate Schedules

In the face of the positive command for the filing of rate schedules[10] as of June 7, 1954, by all "Independent

[10] Order 174 A, Section 154.92, "(a) Every independent producer who, on or since June 7, 1954, has engaged in the interstate * * * sale of natural gas subject to the jurisdiction of the Commission shall on or before October 1, 1954, [subsequently changed to December 1, 1954] file with the Commission rate shedules, as defined in Section 154.93 hereof, setting forth the terms

Producers", it is difficult for me to follow the majority's statement (Magnolia No. 15320), "* * * Order 174-A is not a formal determination of any right or obligation; is not self-executory, and it does not command these petitioners to do or refrain from doing anything. * * *"

Since the Order (§ 154.92) is directed to an "Independent Producer" who is, in turn, defined in § 154.91 to be those who make interstate sales while producing and gathering, this regulation is an immediate, positive, firm, absolute requirement for the filing of rate schedules. It is plain and unequivocal in its terms, and being a regulation, it subjects those who fail to comply to the severe penalties (note 4 *supra*) of "$500.00 for each and every day during which such offense occurs." Not only does it subject the producer to fines and penalties, but the filing of these contracts by its nature turns his business into one of public concern. What was the moment before Order 174 his business, now becomes the Commission's business. It may be that ultimately that is what the Phillips decision intended and the regulation will have a validity to achieve that end. But that does not remove the fact of the impact of this regulation upon this business man. It, and it alone, compels him under the pain of immediate penalties to alter his whole business concept.

And in this situation particularly, it is the impact of the regulation alone which brings about the necessity for filing of the rate schedules. The Act itself is not self-executing and requires the regulations as a condition precedent.[11]

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and conditions of service and all rates and charges for such * * * sale effective on June 7, 1954. * * * (b) Every independent producer who, subsequent to the effective date of these rules, proposes to initiate an interstate * * * sale * * * to an existing or new customer shall file with the Commission not less than 30 days nor more than 60 days * * * a rate schedule * * *."

[11] Section 4(c) of the Act: "Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, within such *time* * * * and in such *form* as the Commission may designate, and shall keep open in conven-

Moreover, this specific provision of the Order illustrates well the futility of later, or more, or subsequent proceedings which the Commission insists are necessary to satisfy the requirement of exhaustion of the administrative process. E.g., *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 82 L.Ed. 638; *Public Service Comm'n* v. *Wycoff*, 344 U.S. 237, 97 L.Ed. 291; *Canadian River Gas Co.* v. *Federal Power Commission*, 10 Cir., 110 F.2d 350, reh. den., 113 F.2d 1010, cert. den. 311 U.S. 693, 85 L.Ed. 449; *United Gas Pipe Line Co.* v. *Federal Power Commission*, D.C. Cir., 181 F.2d 786, cert. den. 340 U.S. 827, 95 L.Ed. 607. If a regulation is not valid either because it is too sweeping or, as claimed by some of these petitioners, it covers a person not within the Act, how is it to be tested? If the complaint is directed against a regulation compelling the filing of private papers, what more is needed to test that than the Order itself? What sort of administrative proceeding is reasonably needed if a citizen conscientiously thought that this provision of the Order was illegal? Must he surrender the very papers for public perusal which he contends are his own business? If he is hurt because he is threatened with the necessity of surrendering private documents, has it not become incurable if to test it, he must first comply?

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ient form and place for public inspection schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission * * *." [Italics mine]

Whatever may be the juridical metaphysics, e.g., Douglas v. County of Pike, 101 U.S. 677, 25 L. Ed. 968; Norton v. Shelby County, 118 U.S. 425, 30 L. Ed. 178, of what the 1954 Phillips decision did to a 1938 Act, it is plain that the Commission never claimed that it had the right to or was regulating these independent producers, Columbian Fuel Corporation, 2 FPC 200; Fin-Ker Oil and Gas Production Co., 6 FPC 92; Chicago Corporation, 6 FPC 98; Phillips Petroleum Co., 10 FPC 246, and to suggest now that on the birth of *Phillips*, the general regulations covering interstate transmission pipeline companies applied automatically to these individual producers lacks genuine substance.

The Order Requires Filing of Changes in Rate Schedules

Equally compelling, Section 154.94, is the imperative command that, "No change shall be made in any rate, charge, or service in effect on and after June 7, 1954, for the interstate * * * sale of natural gas * * * by any independent producer required to file rate schedules pursuant to Section 154.92 hereof, without first filing a change in rates pursuant to Section 4(d) of the * * * Act and in accordance with this section."

No status determination is needed here. The definition is "Independent Producer" and a sale which makes him one under Section 154.91 is all that is needed. From that moment on the regulation by its own terms is self-executing to impose the mechanical obligation of preparing and filing all such changes. Not only does that impose an obligation subjecting the producer to a $500.00 daily fine for noncompliance, but this has an immediate effect in circumscribing the nature and extent of his business negotiations, transactions, and agreements which he may make, or desire to make, with present or prospective customers. Surely an Order which states that no change can be made unless it is first filed has real and far-reaching effects. The very imminence of such a regulation calls for the immediate reconstruction of one's business. In the fundamental concept of its nature, it has, in the twinkling of an eye, ceased to be private and now becomes clothed with a certain public interest, or at least a certain public control.[12]

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[12] It should be borne in mind that questions of this type stated in the emphatic terms are not to be taken as a conclusion that such Governmental supervision is wrong or invalid, or that the regulation is. We are here concerned only with an analysis of the Court's theme that Order 174 has no effect upon, does not require action by, these petitioning gas producers.

The Order Prohibits Automatic Contract Escalations

Here, without a doubt, the regulations promulgate a new and revolutionary policy having substantive consequences of great importance. For the Order, in connection with its requirements concerning the filing of rate schedules and changes in rate schedules, categorically states that contract escalations are a change of rate.[13] This has a substantial and immediate twofold impact: first, from a technical, procedural point of view, it has the effect of making the escalated rate a "new" or initial filing under Section 4(d)(e) with the complex problems of burden of proof and interim suspension flowing from that; and, second, the inability of the parties as a matter of actuality to enjoy the complete, prompt and uninterrupted performance of the agreements as made by them.

At the heart of both is the fact that, "* * * the Act, * * * evinces no purpose to abrogate private rate contracts as such. To the contrary, by requiring contracts to be filed with the Commission, the Act expressly recognizes that rates * * * may be set by individual contracts * * * The obvious implication is that, except as specifically limited by the Act, the rate-making powers of natural gas companies were to be no different from those they would

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[13] Section 154.94 (Order 174 A): "The operation of any provision of the rate schedule providing for future or periodic changes in the rate, charge, classification, or service after June 7, 1954, or the effective date of any rate schedule for intial service after June 7, 1954, shall constitute a change in rate schedule."

Substantially the same provision is contained in Section 154.94(c) of Order 174 B except that this Section has been made even more specifically applicable to price changes provided for in an "initial rate schedule." In addition, Order 174 B, Section 157.25, condemns, in advance, escalator clauses in producer contracts submitted in support of applications for Certificates which would, of course, affect interstate transmission pipeline companies, since long-term contracts for their essential gas reserves which have heretofore contained escalation clauses (see note 14 infra) could no longer contain them. This is thus a radical departure on a wide front from former substantive policies.

possess in the absence of the Act: to establish *ex parte,* and change at will, the rates offered to prospective customers; or to fix by contract, and change only by mutual agreement, the rate agreed upon with a particular customer. * * * By preserving the integrity of contracts, it permits the stability of supply arrangements which all agree is essential to the health of the natural gas industry." *United Gas Pipe Line Company* v. *Mobile Gas Service Corporation,* — U.S. —, — L.Ed. — [No. 17 and 31, October Term 1955, February 27, 1956].

The petitions before us adequately show that these gas producers each have long-term contracts with various gas purchasers, interstate transmission pipeline companies in which, following the traditional usage of the industry with the full approval of regulatory agencies, provision is made for the automatic increase in the price of the gas under the stated conditions. The escalation provisions are the direct outgrowth of the necessities of the contract and of the pipeline purchaser. Those proposing an interstate transmission pipeline must have two principle things: one, financing in astronomical sums, and, two, certificates of public convenience and necessity from the Commission. Investment bankers and underwriters of these securities require long-term supply and outlet commitments to justify the economic forecasts of the promoter. And the regulatory agency which, by the Certificates both approves the construction of the line and the issuance of securities for its financing, demands a like showing to establish fitness, ability and capacity to serve.[14]

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[14] Reference here to the Suspension Cases, and particularly Stanolind (No. 15627) and Continental Oil Co. (No. 15678), involving as they do gas from the Woodlawn Field, Texas removes this from the dreaded vacuum. The Federal Power Commission in the Mississippi River Fuel Corporation case (Docket G-1281, et al) in 1952 stated: "The most important matter presented for consideration in the instant Mississipp certificate proceedings concerns the adequacy of the gas supply showing made by Mississippi in support of its proposed system expansion. The importance

The imperative requirement that the purchaser have a long-term contract makes it essential that, in the ordinary course of business judgment, the seller have some means of protecting himself against the unpredictable fluctuations or developments in the twenty-year period. These take the form normally of automatic step increases in price at stated times or intervals and "Favored Nations" clauses, single or general, to assure that the seller has the opportunity of enjoying the general increase the value of gas in the area, reflected by genuine, good faith transactions or tenders, and, invariably, for proportionate increases in production, severance, or similar state taxes.

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of an adequate gas supply showing has been stressed by the Commission in certificate proceedings, since every certificate of public convenience and necessity under the Natural Gas Act must be based upon appropriate findings, among others, that the applicant for such certificate is 'able and willing properly to do the acts and to perform the service proposed.' 'An adequate gas supply', as the Commission stated in its Opinion No. 230 and Order of June 24, 1952, *In the Matter of Northern Natural Gas Company*, Docket No. G-1618 • • •, 'is the bedrock upon which such findings must be grounded.' 'A gas supply can be considered adequate,' as the Commission further stated in the *Northern* case, *supra*, 'only if the volume available is sufficient to meet the demand requirements for the service proposed, if such volume is assured over a sufficient period of years to justify the expenditures required for the construction of the proposed pipe-line project, and if that assurance of a continuing supply of natural gas meets the requirements of public convenience and necessity. Generally, a supply of natural gas should be assured for a period approximating fifteen to twenty years, dependent upon the particular facts involved, if the pipe-line project is to be economically sound and in the public interest and if the natural-gas company is to be in position to meet its obligations to investors and provide dependable service to consumers.' " The Commission then recited that they had previously found Mississippi's supplies inadequate but allowed additional time to correct it. Acquisition of additional reserves is approved: "• • • At the 1952 hearings Mississippi showed th8at it had entered into additional gas purchase contracts, covering the purchase of gas in the • • • Woodlawn gas fields in Texas • • •. These contracts are for primary terms

The immediate effect of this Order is, therefore, to destroy the binding character of the agreement made between seller (producer) and purchaser (pipeline). The rate may ultimately be the same, but only after someone has convinced the Commission, or Court, or both that what the parties agreed to do was fair, just and reasonable.

The Commission seeks to avoid this impact by insisting that the contract "rate" preserved by *Mobile, supra,* is the one being charged at the particular time and that what is payable before or after is of no consequence. That may ultimately be the rule of law. But it is not the rule of business and to assert it by this Order subjects these parties to real and damaging and pressing results. It becomes all the more devastating when, as I shall later discuss, we consider the effect of the Order requiring that an Independent Producer file an application for a Certificate of Public Convenience and Necessity to institute a sale and secure approval before he may abandon it. For here, by virtue of the Order 174 regulations, a person who, at the time of the contract, was considered an individual enterpriser under not Governmental restrain or regulation, is suddenly informed that the contract rates to be paid to him in the last half of the contract period (and without which he would not have made the bargain) have no validity as a contract henceforth, and if collectible, they

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of 20 years and provide prices ranging between 10.88¢ and 12.46¢ per Mcf * * * at the beginning of their terms, and thereafter higher prices are specified. * * *"

Another Suspension Case, Union Oil (No. 15461), involves suspension of escalated rates under a long-term contract with Transcontinental Pipe Line Company resulting from a renegotiation of the contract long prior to June 7, 1954, made primarily to meet the objections of the Federal Power Commission in Dockets No. G-2367 and G-4185 (see opinions No. 279 and 280, December 1954, March 1955, respectively) to sufficiency of gas reserves. After restudy of the gas supply reserves showed them to be 16.6 to 17.9 years, Transcontinental's application for certificate to build and finance facilities costing approximately $40,000,000.00 to compete for the rich New York market area was approved.

are so only by order after a hearing by a Governmental bureau. Anyone outside of a courtroom would say that that was a real and present impact. I think Judges must recognize it as well.

And this business impact is not limited to pre-existing contracts. These petitioners are engaged in the search for and continuous production of gas. How can it be said that the presence of this regulation evincing a determined radical change in policy does not have a weighty and pressing effect upon current business judgments and transactions? If truck owners and television station owners are given the protection of judicial reviewability of orders of general application, regulations which alter markedly their business activity or immediately encumber, frustrate or handicap business plans, *Frozen Foods, supra, Storer, supra,* I would think these producers make out as appealing a case. As long as this regulation stands, new contracts cannot be made which give this margin of protection against unknown future changes over the long contract periods. Somehow the business man, as the gas producer, will have to adapt his activities to that situation. If he raises his rates to secure the aggregate of what was formerly on a sliding scale, he may lose the purchase-sales contract. If he reduces the price to a lower figure, he may soon find himself with a contract out of harmony with his neighbors. The point here is not whether this is good law or bad law; whether the regulation is valid or invalid —it simply is that as long as it stands undetermined all business is unavoidably affected by it.

Until this regulation is tested and the validity of this policy is determined, a major industry must speculate. This is a serious and troublesome point of law which a Court must and may determine. These Order 174 Cases and the Suspension Cases present it adequately for in both the Order does have an immediate, far-reaching consequence.

Nor can the impact of this pervasive policy against con-

tract escalations be avoided or lessened by self-help,[15] since the customer (purchaser) of one of these producers is invariably an interstate pipeline transmission company and, being licensed under Certificates issued by the Commission, it is forbidden in fact and practice to pay more for its gas requirements than approved contracts permit. The present customer (purchaser) under an existing contract cannot pay more even though it is in accordance with its agreement and it desires to do so, and the seller (producer) can find no relief by a termination of the contract since, as we shall see, Commission consent is demanded under the Order for termination or abandonment.[16]

This administrative prohibition of automatic contract escalation provisions also has important, far-reaching, immediate and pressing technical consequences in the administration of the Natural Gas Act. These consequences, while technical, have profound substantive results. This is so because Section 154.94, if valid, makes an automatic contract rate increase, a "change in the rate schedule."

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[15] It is doubtful that Government (Administrators) should ever be permitted, in insulating their actions from judicial review, to assert that the citizen must run the bold course of defiance as a means of testing legality. "Most rules of conduct having the force of law are not self-executing but require judicial or administrative action to impose their sanctions with respect to particular individuals. Unlike an administrative order or a court judgment adjudicating the rights of individuals, which is binding only on the parties to the particular proceeding, a valid exercise of the rule-making power is addressed to and sets a standard of conduct for all to whom its terms apply. It operates as such in advance of the imposition of sanctions upon any particular individual. It is common experience that men conform their conduct to regulations by governmental authority so as to avoid the unpleasant legal consequences which failure to conform entails. • • •" Columbia Broadcasting System, supra, 316 U.S. at 418, 86 L. Ed. at 1571.

[16] This is what the producers sought to do in the Abandonment Cases (Lee, Trustee, 15749; Shank, Trustee 15832), but which, for nearly two years, the Commission has thus far prohibited.

If it is a "new" rate by virtue of the regulation, it then falls under Section 4(d) of the Act requiring filing and notice before its effective date and, more so, it is then subject to Section 4(e) which gives the Commission the right to suspend for five months and require a repayment surety bond for subsequent collections until the rate hearing is completed. To these sanctions is added a burden of proof to show that the increased rate is just and reasonable.[17] On the other hand, if the automatic escalation increase is but a part of the entire total contract rate,[18] the application of the automatic increase is not the promulgation of a *new* rate, and the review[19] of such rate would be by a hearing pursuant to Section 5(a).

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[17] Section 4(e), "Whenever any such new schedule is filed the Commission shall have authority * * * to enter upon a hearing concerning the lawfulness of such rate, * * * pending such hearing * * * may suspend the operation of * * * such rate * * *. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company, * * *"

[18] United States v. Bethlehem Steel Corp., 315 U.S. 289, 298, 86 L. Ed. 855, 862: "The Master and the courts below, however treated these clauses as non-severable; to do otherwise would call for departure from accepted principles of the law of contract. Whether a number of promises constitute one contract or more than one is to be determined by inquiring 'whether the parties assented to all of the promises as a single whole, so that there would have been no bargain whatever, if any promise or set of promises were struck out.' Williston on Contracts, Rev. ed. § 863 and cases there cited."

[19] "The powers of the Commission are defined by §§ 4(e) and 5(a). The basic power of the Commission is that given it by § 5(a) to set aside and modify any rate or contract * * *. It is simply the power to review rates and contracts made in the first instance by natural gas companies and, if they are determined to be unlawful, to remedy them. Section 5(a) would of its own force apply to *all* the rates of a natural gas company, whether long established or newly changed, but in the latter case the power is further implemented by § 4(e). All that § 4(e) does, however, is to add to this basic power, in the case of a newly changed rate of

The Suspension Cases before us and the administrative experience[20] of the Commission demonstrate that this is no idle, academic, theoretical difference. It is the difference between suspension and no suspension, between money in the producer's hands and money in the purchaser's.

The Order thus introduces a revolutionary policy reversing a known business and administrative practice approved over the years. It is the regulation which does this and not the statute since, in the absence of the regulation, it would be open to producers and purchasers to place their own good faith construction upon Section 4(d) of the Act. But the regulation is imperative: a failure to file subjects the producer to a daily fine of $500.00. To collect the "new" rate, if the purchaser would pay it, would be another violation. Substantial doubts exist concerning the validity of the regulation. The doubt arises on its face. The danger and consequence, if invalid, is pressing and immediate. And no further record proof or

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contract * * * the further powers (1) to preserve the status quo * * * by susending its operation * * * and (2) thereafter to make its order retroactive, by means of the refund procedure * * *." United Gas Co. v. Mobile Gas Corp., supra. [Italics by the Court]

[20] The Commission's letter report May 4, 1956, to Senator Gore revealed 191 cases involving annual increases (not including state tax increases) of $18,737,482.00 in which escalation rate increases have been suspended and hearing or decision is pending. Presumably, at least 5/12ths (5 months maximum suspension period) of this is an irretrievable loss to producers even though the Commission ultimately approves the increased rate. Apparently only 39 cases have been disposed of involving $3,218,297.00 annual increases, and the Examiner's reports and Commission decisions thereon submitted as typical examples of the Administrative problems indicate the complex matters which an applicant must face and perhaps shoulder in showing the proposed increase to be just and reasonable, e.g., is a fair price to be determined by the going price in the field? By invested capital, and if so, upon what basis, per well, or field, or unit? By a desired rate of return and if so, what percentage and upon what base?

evidentiary facts is needed to make it ripe for judicial determination.

The Order Requires Application for Certificate of Public Convenience and Necessity

The Order Forbids Abandonment-Termination of a Sales Contract Without Commission Approval

The purpose of the Commission to bring all producers within the scope of its interpretation of the Phillips case (defined in Section 154.91) and to subject all such producers to the severe obligations of a public utility is manifest by Section 157 of the Order. Certificates of Public Convenience and Necessity[21] must be obtained for each service and the service may not be abandoned[22] without Commission approval.

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[21] Section 157.23(a): "Every independent producer of natural gas who, on or since June 7, 1954, has engaged in the interstate * * * sale of natural gas subject to the jurisdiction of the Commission * * * shall * * * file with the Commission an application * * *. (b) No independent producer of natural gas shall, * * * engage in any new service with respect to the * * * interstate * * * sale of such natural gas for resale in interstate commerce * * * without approval of the Commission, evidenced by a certificate of public convenience and necessity * * *" The contents of the applications are carefully prescribed concerning exhibits, technical data required, etc.

[22] Order No. 174 A provided: Section 157.28 "No independent producer as defined in Section 154.91 of these rules shall abandon any sale, transportation or service, subject to the jurisdiction of the Commission, being rendered on or since June 7, 1954, without the express permission and approval of the Commission first had and obtained * * *."

In Order No. 174 B this was changed by substituting the words of Section 7(b) of the Act and adding the proviso: "*Provided, however,* That nothing herein shall be construed as interfering or as intended to interfere with or to prevent compliance by a natural-gas company with valid conservation orders of a State agency relating to the production or gathering of natural gas."

The Abandonment Cases before us and other administrative

As in the case of other sections of the Order which I have discussed, the regulation has a force transcending the Act. In the absence of a regulation, it is left to the individual gas producer to determine whether he comes under the Act, is a natural gas company, whether the Act (Section 7(c)) is to cover sales, whether the sale is one bringing him within the Act or the Phillips decision and, on termination or abandonment, whether the sale is a service rendered by means of jurisdictional facilities. If he or his lawyer guess wrong, he is exposed to the possibility of enforcement proceedings (Section 20), or criminal prosecution (Section 21(a)) for "wilfully and knowingly" doing an act "declared to be unlawful", or as one who "omits or fails" to do an act "required to be done."

But with the regulation, all this is removed. It peremptorily requires the filing of an application for a Certificate, forbids the continuation of an existing, or the commencement of a new, service without it and forbids termination. Failure to comply subjects the person automatically to the penalties of $500.00 for each and every day during which noncompliance continues (Section 21 (b)). And all that would be open to determination would be the validity of the regulation.

It is just as obvious that these dual commands subject those in the gas business to substantial and immediate business consequences. As to existing contracts, the seller

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action taken indicates that in the administrative application by the Commission there is no difference between 174 B and 174 A for sales are considered "service rendered by * * * such facilities" and abandonment of a sales contract by an "Independent Producer" is forbidden: see J. M. Huber Corp. and Northern Natural Gas Co. v. J. M. Huber Corp., Dockets No. G-4326 and G-4957, Federal Power Commission v. J. M. Huber Corp., D.C.N.J., 133 F. Supp. 479 (now pending Court of Appeals, Third Circuit, No. 11799, argued June 18, 1956); Skelly Oil Co. and Lone Star Gas Co. v. Skelly Oil Co., Dockets No. G-5380 and G-5260; Argo Oil Corp., et al, Dockets No. G-6810, G-6811, G-2591 and G-2950.

(producer) is helpless in his effort to enforce the mutual obligations for automatic escalation rate increases. His purchaser may not pay him the agreed increase. He must file his application as an "initial" rate under Section 4 and suffer the risk of a suspension and the burden of establishing the reasonableness of the rates. His only relief of self-help—that is, termination—is denied him because he must obtain Commission consent here as well. Whether as to existing contracts or the making of new ones, a producer knows that this subjects him to the far-reaching responsibilities of a public utility—a status which courts are reluctant to impose because of the inevitable encroachment upon normal business freedom unless the statutory command is clear, *Munn* v. *People of the State of Illinois*, 94 U.S. 113, 24 L.Ed. 77; *Wolf Packing Co.* v. *Court of Industrial Relations*, 262 U.S. 522, 67 L.Ed. 1103. All persons dealing with a defined gas producer, whether banker, investor, processor, transporter, or purchaser, would of necessity have to trim negotiations and the final agreement to the pattern of public utility and its potential governmental regulation. Business men would know this instinctively. Judges, I think, should know as much.

And yet there is, at least, a substantial question whether the Act justifies a regulation imposing this *status* on the mere sale of gas, even one within the orbit of the Phillips case. There is a strong likelihood that the terms of the Act and legislative history will confine certification requirements to those constructing and operating physical facilities.[23]

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[23] The command to apply for a certificate is found in Section 7(c). Its opening sentence restricts it to the completion of proposed facilities: "No natural-gas company or person which *will be* a natural-gas company *upon completion* of any *proposed construction* or extension shall engage in the transportation or sale of natural gas * * *." (Italics mine) This was the amendment of February 7, 1942, Public Law No. 444, 77th Congress, Chapter 49, Second Session [H.R. 5249], 56 Stat. 83. In its original form the Act required a certificate only when a company was enter-

There is even greater doubt concerning the right to forbid or regulate abandonment of sales since the Act[24] relates expressly to service by jurisdictional facilities. The Congressional purpose[25] to restrict the prohibition against abandonment to services rendered by jurisdictional facilities seems quite plain and is, interestingly enough, apparently acknowledged by the Commission.[26] If, then, the

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ing a "market in which natural gas is already being served by another natural-gas company • • •" As investors and promoters were unwilling to risk the building of a line unless the statutory condition were met, it resulted in invariable hearings to prove the negative. The amendment was sought by the Commission to require certificates in the case of all *construction,* see hearings on H.R. 5249, 77th Congress, page 15 et seq.

[24] Section 7(b), "No natural-gas company shall abandon all or any portion of its *facilities* subject to the jurisdiction of the Commission, or any service rendered by means of such facilities • • •." [Italics mine]

[25] The Act originated in H.R. 5423, 74th Congress, as amendments to the Public Utility Act of 1935 with a "facilities" provision identical with Section 7(b) (see hearings H.R. 5423, 74th Congress, 1st Session, pages 32, 44, § 305(b)); the next bill, H.R. 11662, 74th Congress, 2nd Session, contained no prohibition on abandonment and representatives of the State Commissioners proposed an amendment that, "No gas company • • • shall discontinue service • • •," but this was rejected and language of present § 7(b) was used. In the 75th Congress, 1st Session, on H.R. 4008, efforts by the New York Public Service Commission to obtain an amendment, "No natural gas company shall abandon service to any of its customers • • •" failed, and H.R. 6586, 75th Congress, 1st Session, which became the Act, contained the language now found in § 7(b). The Committee report, No. 709, 75th Congress, 1st Session, stated, "Subsection (b) requires approval of the Commission by any natural gas company desirous of abandoning any or all of its facilities subject to the jurisdiction of the Commission • • •."

[26] By letter, June 17, 1955, from Chairman Kuykendall, Federal Power Commission, to Chairman of the Senate Committee on Interstate and Foreign Commerce, amendment of Section 7(b) was proposed to make clear "• • • that the Commission is authorized

proper construction of 7(b) is that it relates only to services rendered by jurisdictional facilities, the regulation would be invalid in prohibiting termination of sales contracts unless the given sale was accomplished through physical facilities owned or operated by that producer in the performance and rendition of the sale and such facilities were "subject to the jurisdiction of the Commission."

And finally, the petitioners urge with much basis, the *sale* of gas by a producer from a producing well is a direct and immediate part of production and is therefore within the full protection of Section 1(b). Nothing in the Phillips decision detracts from prior holdings that the Commission is powerless to regulate, forbid, prohibit, or direct the production of gas, *Federal Power Commission* v. *Panhandle Eastern Pipe Line Co.*, 337 U.S. 498, 93 L.Ed. 1499.[27]

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to pass upon the proposed abandonment of any sales in interstate commerce for resale by independent producers." See hearings, 84th Congress, 1st Session, on S.712 et al, pages 1234, 1235. No such bill was passed. Apparently the Commission has sought from Congress legislation designed to impose a general service obligation, see hearings, 80th Congress, H.R. 4051, pages 99, 100, 428-430, 461-462, and has sought to amend Section 7(b), see Annual Reports 1951 at page 145; 1952 page 152; 1953 page 155; 1954 page 170.

[27] The Commission's Order forbidding the transfer of leases was reversed: "The Commission seeks to distinguish between the activities of production and gathering, such as drilling, spacing wells, or collecting gas, and the facilities, such as reserves and gas leases, used therefor and argues that only the former were excluded from the coverage of the Act * * * In Colorado Interstate Gas Co. v. Federal Power Commission, 324 U.S. 581, 603, 89 L. Ed. 1206 * * * we said that this phrase comprehended the producing properties and gathering facilities of a natural gas company. We now adhere to this natural and clear meaning of the words and their obvious expression of Congressional intent. Of course, leases are an essential part of production. * * * The Federal Power Commission leans heavily upon Section 7(b) * * *. The argument here is that since natural gas is the 'lifeblood' of a pipe-line system, a company by disposing of its gas reserves, unhampered by Commission control, may render itself unable to continue service; consequently

If, without let or hindrance from the Commission, a certificated natural gas company can surrender or transfer its leases—that is, the right to the gas—because the leases and the gas covered thereby are a part of production, it seems difficult to believe that a producer cannot determine whether he will continue to permit gas which he is producing to leave his well, and if so, whether it shall go to one or to the other.

The present Order forbids this. It is ever-present in the shaping of gas transactions. And in the Abandonment Cases before us, it has kept particular gas producers from enjoying the fruits of and complying with the contracts made by the new purchasers with consequent substantial money losses.

The Order Compels Other Action

By operation of the Order, the magic date of June 7, 1954, is of critical importance. If it is valid, it orders a roll-back of rates to a prior date. Imposing a retroactive rate which is beyond the general power of the Commission subjects producers to real and immediate harm. If it is not valid, it requires no record, no evidence to determine it. These and many other specific impacts result from the Order, but those discussed sufficiently illustrate the practical consequences and the ripeness now for judicial review. Serious questions of law call for an immediate determination by constitutional courts. Neither orderly administration nor due regard to the separation of executive

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abandonment of facilities and service without the consent of the Commission will result. The argument begs the question. The section, like those above, covers only 'facilities subject to the jurisdiction of the Commission.' " Federal Power Commission v. Panhandle Eastern Pipe Line Company, supra, at 337 U.S. 504-509, 93 L. Ed. 1504-1507. And see Colorado Interstate Gas Co. v. Federal Power Commission, supra, Interstate Natural Gas Co. v. Federal Power Commission, 331 U.S. 682, 91 L. Ed. 1742; Federal Power Commission v. Hope Natural Gas Co., 320 U.S. 591, 88 L. Ed. 333, approved expressly in the Phillips decision.

and judicial functions compels or suggests that review should be postponed.

II.

Suspension Cases

In each of the Suspension Cases, the producer sought to collect the increased rate resulting from automatic contract escalation provisions. These rate increases were treated as "new" filings under Section 4 and were suspended for various periods of time. As thus presented each involves the question discussed at length concerning the nature of escalation increases and the Commission's power to forbid them. That is a serious question of law with substantial arguments on both sides. If what I have said is correct, then these petitioners in the Suspension Cases are certainly aggrieved and, as to them, the question is ripe for judicial review.

But the majority never gets to this point for the holding is simply that a suspension order, even though invalid, is not a Section 19(b) "Order." In my judgment, this ignores the significant absence of any modifying term such as "final" in Section 19(b) and is, again, a situation in which the Court has closed its eyes to reality. A suspension order is final in fact. As these verified petitions reflect, for the period of suspension the seller has been unable to collect what he claims is the rightful increase in rate. This amounts in dollars to huge sums of money individually and collectively. There is no relief because the Commission has no power to award reparations or to impose out of current rates an amount needed to make up for a past deficiency due to an improvident suspension.[28]

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[28] Federal Power Commission v. Hope Natural Gas Company, supra; State Corporation Commission of Kansas v. Federal Power Commission, 8th Cir., 215 F. 2d 176; Hope Natural Gas Company v. Federal Power Commission, 4th Cir., 134 F. 2d 287, 310, "The Natural Gas Act shows clearly that it was the intention of Congress to give the Commission * * * regulatory power as to future

Testing reviewability the hypothesis must be that the Order is invalid. On that assumption what more is needed, either to impose real, pressing, irreparable injury, or to present for review the serious question of law? Each of these Suspension Cases presents the common question: Is an escalation increase subject to suspension? If it is, then the matter must grind through the administrative process. If it is not, then no facts, no evidence, no peculiar circumstances can make it such. And the Commission's suspension order, in such an eventuality, ought to be set aside to restore the parties to their prior condition so near as the law may do it. Of course, the Commission cannot, to defeat reviewability, assert that "facts" are needed to prove that petitioners are subject to the Act, for the very act of issuance of the suspension order is a finding of coverage. Petitioners may question it on the review when granted, but the Administrator can not claim he lacked power to do what was done.

Moreover, it should be remembered that a suspension is a unique procedure from the standpoint of both the gas company and the Commission. The Commission's power is extremely limited. It may invoke it only within the 30-day notice time and it may not extend it beyond five months. Once the rate becomes effective, it is assumed that no power to suspend can be revived. Once the five months has expired, the power is gone except insofar as the surety bond may continue it conditionally in effect. It is entirely separate from the hearings which must be held, *United Gas Pipe Line Company* v. *Mobile Gas Service Corporation, supra,* and whatever is done within the five months is forever and irretrievably final. When one seeks a judicial review of an order assumed to be invalid because

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rates; but there is no indication of any intention to clothe it with judicial or quasi-judicial powers with respect to past charges or practices, such as was vested in the Interstate Commerce Commission * * * As the Commission itself says, it was not given authority to fix rates for the past or to award reparations on account of past rates."

it forever deprives a person of his right to recover substantial sums of money presumably due under a contract, and the question of its validity will have no bearing whatsoever on the ultimate approval of the rates involved, the appeal is not an effort, as characterized by my Brothers, to disturb the orderly administrative processes.

Precisely this problem—an illegal suspension order—was presented in *Atlantic Seaboard Corporation* v. *Federal Power Commission*,[29] 4th Cir., 201 F. 2d 568, and jurisdiction under Section 19(b) was sustained. I have searched in vain for those facts or legal principles which have led my Brothers to state, "We think that case is clearly distinguishable from the case at bar." And to it may now be added *Phillips Petroleum Company* v. *Federal Power Commission*,[30] 10th Cir., 227 F. 2d 470. See also *Isbrandtsen*

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[29] To the familiar lament from the Commission, the Court stated at 201 F. 2d 572: "We are not impressed with the argument that we are without jurisdiction in the premises * * *. The Commission argues that the order which we are asked to review is not a definitive or final order * * *; but our power to review is not limited to final orders. * * * The order which we are asked to review is therefore sufficiently distinct from the general subject of the litigation and sufficiently final and definite to justify us in exercising the power of review vested in us by the statute."

[30] The same objection was made: "Reviewability is thus not strictly limited to final orders. * * * And, reviewability extends to an order issued by the Commission which finally determines the legal rights of the parties with respect to matters within the scope of review. See Atlantic Seaboard Corp. v. Federal Power Commission, 4th Cir., 201 F. 2d 568; * * *. The Orders sought to be reviewed here do not deal with the merits of the proceeding before the Commission in the sense that they were entered upon evidence concerning the reasonableness of the rates. They do not purport to finally determine Phillips' wholesale rates. That matter is left to a conventional hearing in these proceedings. But the orders do purport to establish with finality the wholesale rates which Phillips was authorized to charge Michigan on June 7, 1954 * * * the legal consequences which attach to these orders have conclusive effect on the rights and duties of Phillips as an independent producer * * * and they are therefore reviewable." 227 F. 2d at 474.

Co., Inc. v. *United States*, D.C. Cir., 211 F. 2d 51, cert. den. 347 U.S. 990, 98 L. Ed. 1124; *Algonquin Gas Transmission Co* v. *Federal Power Commission*, 1st Cir., 201 F. 2d 334. If the order is the only one which can ever be entered and no collateral proceeding depends upon it, it is sufficiently final, when realistically appraised, to permit reviewability where, on the hypothesis or substantial showing of doubtful validity, great and pressing harm will flow.[31]

Nor, in my view, does reviewability of the Suspension Cases depend finally on invalidity of the regulation forbidding automatic escalation. The parties raised other and substantial questions concerning the sufficiency of the administrative process. These include the repeated use of stereotype suspension orders magnified in several instances by other stereotype denials of rehearing and whether such rubber-stamped treatment met the demands of the statute that the Commission, in suspending, shall deliver "to the natural gas company affected thereby a statement in writing of its reasons for such suspension", Section 4(e); *Amarillo-Borger Express* v. *United States, supra*, and *Long Island Railroad Company* v. *United States, supra*. And, as to at least two of them (Stanolind 15627 and Continental 15678), the action bordered upon complete administrative irresponsibility since for the very same contracts covering the very same gas out of the very same well, the Commission found, in the stereotyped rubric, that the identical rate should be suspended as to one seller but

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[31] See Amarillo-Borger Express v. United States, N.D. Tex., 138 F. Supp. 411, expressly approved and followed in Long Island Railroad Company v. United States, E.D.N.Y. [Civil Action 16321, May 9, 1956] . . . F. Supp. . . ., (statutory three-judge courts), in which an illegal revocation of a suspension order by the Interstate Commerce Commission was enjoined. The extensive materials dealt with under the Administrative Procedure Act raises considerable doubt in my mind that the Court's action here, in rejecting the Administrative Procedure Act, is correct. Of course, reviewability depends on the statutes and not what the parties say they invoke. See footnotes 2, 3 and 4, United States v. Storer Broadcasting Co., supra.

not as to a co-seller. In this and the other respects the State Tax Escalation Cases likewise fit in this category.

III.

Abandonment Cases

In each of these cases, the producer (seller) had a right under the contemporary contracts to terminate the sale of gas. In one there was the right to obtain an increase in the price if bona fide offers were available from others. The current customer declined to meet the tendered increase, and the producer sought to exercise the contract right of termination and sell gas in the future to the new purchaser at the increased price. In the other, the producer sought to exercise his contract rights to select his own purchaser and conclude a gas sales agreement with that new purchase. By whatever label described, the letters and orders of the Commission have effectually prevented the producer from exercising the right to terminate, that is, abandon the sales contract. This is done pursuant to the indicated sections of Order No. 174. If, as the analysis indicates, there is substantial doubt that Section 7(b) covers sales when no jurisdictional *facilities* exist, that order is an illegal one depriving the petitioners of immediate, substantial benefits. If that order is illegal, it is so because of the limited nature of Section 7(b), and no facts, no evidence, no record is needed or essential to an orderly presentment of that substantial and serious question.[32]

By virtue of Section 154.97 (cancellation of rate schedules) and Section 157.23(b), it was likewise necessary for these petitioners to file notice of termination of rate schedules and a request for the issuance of a new Certificate of Public Convenience and Necessity for sale of the

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[32] On the review, if granted, there would be a substantial question whether the Commission had the right to "reject", as they did, one or more of these filings. Mississippi River Fuel Corp. v. Federal Power Commission, 3 Cir., 202 F. 2d 899.

gas to the new purchaser. If, on the analysis I have set out, these regulations are beyond the power of the Commission, it means that by their operation, the petitioners have been deprived of the immediate enjoyment of their private contract rights. That issue is present and has immediate consequences.

IV.

State Tax Escalation Cases

These cases raise the question of the collectibility of increases in the Texas State Production Tax as provided under automatic rate increase escalation provisions in the contracts. Thus they present, in dramatic fashion, the question so vigorously argued by all petitioners on the propriety of the regulation forbidding escalation clauses. The Court in arriving at a decision, presumably on the merits, completely bypasses this question. If, as my discussion indicates, that order may be invalid, then the Commission had no right in these cases to forbid Continental Oil Company from collecting the increase from its effective date (September 1, 1954). (I do not decide this question since I think it too important to determine until we, as a Court, reach it for deliberative joint judgment.) Moreover, the Court's opinion in emphasizing the fact that there was no proof in the record of discrimination in favor of other companies under like situations overlooks the fact that the the petition for rehearing, declined by the Commission, raised those facts and that charge. When it was overruled, I am at a loss to understand how the petitioner could have made any proof. Finally, while the transmutations of the order and the change of dates from September 15 to October 1 and December 1 as set forth in the opinion is accurate, it seems to me that the whole Act imposes on the Commission the necessity of having some reasonable basis for its actions. Conceding, for the moment that there was intended significance in what appears to me to be inadvertent scrivener errors

made under circumstances of understandable and almost hysterical pressure, I would have considerable doubt that a Commission may say to one Texas producer that if the application is filed on October 1, the increase can relate to September 1, but if it is filed on October 2 or November 29, it may not. Not a single reason has yet been advanced to justify that differentiation, and it is evident from the fact that the 174 Orders finally extended filing dates to December 1, that the Commission did not articulately do this because of some administrative necessity. Finally, since the Court does reach some of the merits here, I can find in the record no basis for assuming that the sales involved in these contracts were within the jurisdiction of the Commission. Such findings and evidence is necessary. *Securities Exchange Commission* v. *Chenery Corp.*, 318 U.S. 80, 87 L. Ed. 626; *Stark* v. *Wickard*, 321 U.S. 288, 80 L. Ed. 733; see also, *Panhandle Eastern Pipe Line Co.* v. *Public Service Commission*, 332 U.S. 507, 512, 92 L. Ed. 128, 135.

I have written at such length as my views in all cases because I think these many troublesome legal questions are begging for a Judge's answer. What the answers will be, I do not know. But the Commission by its 174 Orders and action in the individual cases has presented cases ready and ripe for adjudication.

We shut ourselves off from life if we think that that which has had the gas business in such turbulence has, as yet, no affect or impact.

I therefore respectfully dissent.

Judgment

EXTRACT FROM THE MINUTES OF JUNE 30, 1956.

No. 15832.

RALPH B. SHANK, TRUSTEE FOR NELSON BUNKER HUNT TRUST ESTATE,

versus

FEDERAL POWER COMMISSION.

This cause came on to be heard on the petition of Ralph B. Shank, Trustee for Nelson Bunker Hunt Trust Estate for a review of orders of the Federal Power Commission entered on July 1, 1955 and July 8, 1955, and was argued by counsel;

On consideration whereof, It is now here ordered, adjudged and decreed by this Court that the petition for review in this cause be, and the same is hereby, dismissed for lack of jurisdiction.

"Brown, Circuit Judge, dissenting."

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APPENDIX B

Excerpts From the Natural Gas Act

NECESSITY FOR REGULATION OF NATURAL-GAS COMPANIES

SECTION 1. * * *

(b) The provisions of this act shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas. [52 Stat. 821 (1938); 15 U. S. C. § 717 (1946)]

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RATES AND CHARGES; SCHEDULES; SUSPENSIONS OF NEW RATES

SEC. 4. * * *

(c) Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, within such time (not less than sixty days from the date this act takes effect) and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection, schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, classification, or service, or in any rule, regulations, or contract relating thereto, except after thirty

days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint of any State, municipality, or State commission, or upon its own initiative without complaint, at once, and if it so orders, without answer or formal pleading by the natural-gas company, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the natural-gas company affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect: *Provided,* That the Commission shall not have authority to suspend the rate, charge, classification, or service for the sale of natural gas for resale for industrial use only; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of the suspension period, on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification, or service shall go into effect.

Where increased rates or charges are thus made effective, the Commission may, by order, require the natural-gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible. [52 Stat. 822 (1938); 15 U. S. C. 717c (1946)]

FIXING RATES AND CHARGES; DETERMINATION OF COST OF PRODUCTION OR TRANSPORTATION

SEC. 5. (a) Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order: *Provided, however, That* the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural gas company

on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates. * * * [52 Stat. 823 (1938); 15 U.S.C. 717d (1946)]

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EXTENSION OF FACILITIES; ABANDONMENT OF SERVICE

SEC. 7. * * *

(b) No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment. [52 Stat. 824 (1938); 15 U. S. C. 717f (b) (1946)]

(c)[1] No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: *Provided, however,* That if any such natural-gas company or predecessor in interest was bona fide engaged in transportation or sale of natural gas, subject to the jurisdiction of the Commission, on the

[1] Subsection 7 (c) was amended February 7, 1942 by Public Law No. 444, 77th Congress, Chapter 49, 2d Session [H. R. 5249], 56 Stat. 83.

effective date of this amendatory Act, over the route or routes or within the area for which application is made and has so operated since that time, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission within ninety days after the effective date of this amendatory Act. Pending the determination of any such application, the continuance of such operation shall be lawful.

In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly: *Provided, however,* That the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate, and may by regulation exempt from the requirements of this section temporary acts or operations for which the issuance of a certificate will not be required in the public interest. [52 Stat. 825 (1938), as amended, 56 Stat. 83 (1942); 15 U. S. C. § 717f (c) (1946)].[2]

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[2] As originally enacted June 21, 1938 by Public Law No. 688, 75th Congress, Chapter 556, 3d Session [H. R. 6586], 52 Stat. 825, Section 7 (c) read as follows:

"(c) No natural-gas company shall undertake the construction or extension of any facilities for the transportation of natural gas to a market in which natural gas is already being served by another natural-gas company, or acquire or operate any such facilities or extensions thereof, or engage in transportation by means of any new or additional facilities, or sell natural gas in any such

REHEARING; COURT REVIEW OF ORDERS

SEC. 19. • • •

(b) Any party to a proceeding under this act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the circuit court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be served upon any member of the Commission and thereupon the Commission shall certify and file with the court a transcript of the record upon which the order complained of was entered. Upon the filing of such

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market, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require such new construction or operation of any such facilities or extensions thereof: *Provided, however,* That a natural-gas company already serving a market may enlarge or extend its facilities for the purpose of supplying increased market demands in the territory in which it operates. Whenever any natural-gas company shall make application for a certificate of convenience and necessity under the provisions of this subsection, the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission. In passing on applications for certificates of convenience and necessity, the Commission shall give due consideration to the applicant's ability to render and maintain adequate service at rates lower than those prevailing in the territory to be served, it being the intention of Congress that natural gas shall be sold in interstate commerce for resale for ultimate public consumption for domestic, commercial, industrial, or any other use at the lowest possible reasonable rate consistent with the maintenance of adequate service in the public interest." (52 Stat. 825 (1938))

transcript such court shall have exclusive jurisdiction to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

Excerpts From Title 18, Code of Federal Regulations.

(A) PART 154—RATE SCHEDULES AND TARIFFS—OF SUBCHAPTER E, REGULATIONS UNDER THE NATURAL GAS ACT, CHAPTER I OF TITLE 18, CODE OF FEDERAL REGULATIONS.

§ 154.91 *Applicability.*—(a) An "independent producer" as that term is used in this Part means any person as defined in the Natural Gas Act who is engaged in the pro-

duction or gathering of natural gas and who transports natural gas in interstate commerce or sells natural gas in interstate commerce for resale, but who is not primarily engaged in the operation of an interstate pipeline.

(b) The filings with regard to all sales required under § 154.92, § 154.94 and § 157.23 may be made by (1) an operator of one or more wells under co-ownership, (2) an operator where a group of producers are unitized for production and sale, or (3) an operator of a plant processing natural gas and located in the producing area of the gas which it processes and the payments by such operator to the producers represent a percentage of the proceeds of the sale thereof by the operator. Where filings are made by an operator under this paragraph, the parties to the operating arrangement, and those producers who sell to the processing plant described in clause (3) herein, need not file hereunder. When a filing is made by an operator under clauses (1) or (2) herein, he shall submit therewith (i) a list of all persons having working interests involved in the sale of natural gas covered by his filing, (ii) a list of the parties to the operating arrangement, and (iii) a statement of their percentage of their interests. When a filing is made under clause (3) herein, the operator shall file a list of the producers from whom the natural gas is purchased, showing the percentage received by each from the sales. The operator filing hereunder shall submit every twelve months thereafter a statement showing any changes in the several respects since the list was previously submitted.

§ 154.92 *Filing of Rate Schedules by Independent Producer.*—(a) Every independent producer who, on or since June 7, 1954, has engaged in the interstate transportation or sale of natural gas subject to the jurisdiction of the Commission shall on or before December 1, 1954, file with the Commission rate schedules, as defined in Section 154.93 hereof, setting forth the terms and conditions of service

and all rates and charges for such transportation or sale effective on June 7, 1954. To each such rate schedule there shall be attached a statement showing actual billing for a recent month in sufficient detail to show how the billing amount is determined.

* * * * *

§ 154.94 *Changes in Rate Schedules.*—(a) No change shall be made in any rate, charge, or service in effect on and after June 7, 1954, for the interstate transportation or sale of natural gas in interstate commerce subject to the jurisdiction of the Commission by any independent producer required to file rate schedules pursuant to Section 154.92 hereof, without first filing a change in rates pursuant to Section 4 (d) of the Natural Gas Act and in accordance with this section.

(b) Every change in any rate schedule, rate, charge, classification or service effective or applicable to a sale subject to the jurisdiction of the Commission as of June 7, 1954, and on file with the Commission, or required to be filed pursuant to Section 154.92, or in any rate schedule, rate, charge, classification or service effective or applicable to a sale subject to the jurisdiction of the Commission initiated subsequent to June 7, 1954, on file with the Commission, or required to be filed with the Commission pursuant to Section 154.92 shall be filed with the Commission in duplicate not less than 30 days nor more than 90 days prior to the date such change in rate schedule is proposed to be made effective.

(c) The operation of any provision of the rate schedule providing for future or periodic changes in the rate, charge, classification, or service after June 7, 1954, or the operation of any like provision in any initial rate schedule filed after June 7, 1954, shall constitute a change in rate schedule.

(d) Any change in any rate schedule, rate, charge, classification, or service provided in a rate schedule in effect on

June 7, 1954, which by the terms of said rate schedule is to be operative after June 7, 1954 and prior to September 15, 1954, may be filed on less than thirty days' prior notice, subject nevertheless to the right of the Commission to suspend any such proposed change, if the Commission in any case shall, within thirty days after the date of filing, find it necessary to suspend such proposed change. If any such proposed change is suspended, the suspension period will begin with the designated effective date of such change.

* * * * *

§ 154.97 *Cancellation or Termination.*—When a rate schedule or part thereof is proposed to be cancelled or is to terminate by its own terms and no new rate schedule or part thereof is to be filed in its place, the filing company shall notify the Commission of the proposed cancellation or termination at least 30 days prior to the proposed effective date of such cancellation or termination. With such notice the company shall submit a statement showing the reasons for the cancellation or termination and a certification that such notice of cancellation or termination has been served on the affected party or parties, together with names of parties to whom the notice has been mailed.

* * * * *

(B) PART 157 APPLICATIONS FOR CERTIFICATES OF PUBLIC CONVENIENCE AND NECESSITY UNDER SECTION 7 OF THE NATURAL GAS ACT, SUBCHAPTER E, REGULATIONS UNDER THE NATURAL GAS ACT, CHAPTER I OF TITLE 18, CODE OF FEDERAL REGULATIONS.

§ 157.28 *Abandonment of Service.*—No independent producer as herein defined shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is

depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment. *Provided, however,* That nothing herein shall be construed as interfering or as intended to interfere with or to prevent compliance by a natural-gas company with valid conservation orders of a State agency relating to the production or gathering of natural gas.

Excerpts From Decision of Presiding Examiner Issuing a Certificate of Public Convenience and Necessity and Dismissing Applications for Certificates of Public Convenience and Necessity Issued May 8, 1956, Affirmed by Order of Commission Issued June 14, 1956.

(5) The sale of natural gas to Transcontinental Gas Pipe Line Company from the M. Pena and Gonzales wells in Starr County, Northeast Field, Starr County, Texas, in which Applicant has a working interest is made by Sun Oil Company the operator thereof under a processing agreement with Applicant. Under the authority of the Commission's March 10, 1955 order *In the Matter of Humble Oil & Refining Company,* a non-operating owner of a working interest in gas production who is not a party to a contract for the sale of the gas produced from its interest, is not a proper applicant for a certificate of public convenience covering such gas sale and gas sales facilities.

(6) Since NBH Estate is not a proper applicant for certificate covering the sales from the wells described in Finding (5) above, the portion of the application in Docket No. G-4558 covering such transaction should be dismissed.

(7) The application for certificate filed in G-9031 covering the sale of the same natural gas from the same wells as is involved in the part of the application in G-4558 which concerns the sale to Transcontinental Gas Pipe Line Company must be dismissed inasmuch as no application covering the termination of the sale to Transcontinental has been filed under Section 7(b). The question of whether

Applicant must file such application to abandon is before the United States Court of Appeals for the Fifth Circuit in Cause No. 15,832. This application should be dismissed without prejudice to a renewal or reinstatement thereof in the event that Applicant is ultimately successful in its contentions in the courts.

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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 586

RALPH B. SHANK, TRUSTEE FOR NELSON BUNKER HUNT TRUST ESTATE, PETITIONER

v.

FEDERAL POWER COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL POWER COMMISSION IN OPPOSITION

OPINIONS BELOW

The letter orders of the Federal Power Commission, dated July 1 and July 8, 1955 (R. 292–293, 269–270), are not reported. The opinion of the Court of Appeals (Pet. App. 1a–45a) is reported at 236 F. 2d 830.[1]

JURISDICTION

The judgment of the Court of Appeals was entered on June 30, 1956 (Pet. App. 46a). A petition for

[1] The opinion of the court below in *Magnolia Petroleum Co.* v. *Federal Power Commission*, relied on by the court in this case, is reported at 236 F. 2d 785. Judge Brown's dissenting opinion in this case and *Magnolia* is reported at 236 F. 2d 793.

rehearing, timely filed, was denied on August 21, 1956 (R. 534). The petition for a writ of certiorari was filed on November 17, 1956. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1) and Section 19 (b) of the Natural Gas Act, 15 U. S. C. 717r (b).

QUESTION PRESENTED

Petitioner, an independent producer of natural gas, filed (with jurisdictional reservations) an application for a certificate of public convenience and necessity for a sale of natural gas made by it under contracts in effect on June 7, 1954, the date of this Court's decision in *Phillips Petroleum Co.* v. *Wisonson,* 347 U. S. 672, and also filed the contract for such sale as an initial rate schedule. Petitioner then undertook to discontinue this sale and to sell the gas at a substantially higher price to another company as of July 15, 1955. To this end, petitioner (still not accepting Commission jurisdiction) sought to withdraw, as of July 15, 1955, the original initial rate schedule, and the original certificate application. It also filed a certificate application and a rate schedule for the new sale to be effective the same date.

The question presented is whether the Commission's orders, in effect refusing to permit petitioner's attempted withdrawals, are reviewable under Section 19 (b) of the Natural Gas Act prior to hearing, in accordance with Section 7 (b) of the Gas Act, on petitioner's proposed abandonment of the original sale and service.

STATUTE AND REGULATIONS INVOLVED

The pertinent provisions of the Natural Gas Act and of the Federal Power Commission's regulations are set out in the Appendix to the petition at pp. 47a–58a.

STATEMENT

Petitioner owns an interest in two producing gas wells in Texas, which it operates under joint operating and gas processing agreements with Sun Oil Company. Under these agreements, one dated May 23, 1951, and the other, May 20, 1952, Sun processed petitioner's gas and delivered it to petitioner or its vendees; whenever petitioner did not take or dispose of all its gas, Sun could, at its election, buy the gas itself or sell it for petitioner, such authority being revocable at petitioner's will (R. 100–101, 133–134). On June 7, 1954, petitioner's gas was being sold to Transcontinental Pipe Line Corp. (Transco) under the terms of a contract between Sun and Transco, dated September 24, 1947 (R. 8–36).

On June 7, 1954, this Court entered its decision in *Phillips Petroleum Company* v. *Wisconsin,* 347 U. S. 672, holding that sales by independent producers of gas for resale in interstate commerce are subject to the provisions of the Natural Gas Act. As a direct result, an entire segment of the natural gas industry was subject to Commission regulations which, having been designed primarily for the regulation of pipeline companies, were ill-suited to independent producers. To bring the independent producers within the regulatory framework of the Act as fairly and expeditiously as

possible, and to avoid subjecting them to the detailed requirements of its existing regulations applicable to "natural-gas companies," the Commission, on July 16, 1954, issued Order No. 174 (19 F. R. 4534) providing "reasonably simple rules and regulations" to be applicable to "independent producers" (as there defined). This order, amended and reissued as Order 174–A on August 6, 1934 (19 F. R. 5081) and as Order 174–B on December 17, 1954 (19 F. R. 8807, 8808), directed such independent producers, by December 1, 1954, to file, *inter alia,* (1) schedules of their existing rates as of June 7, 1954 (the date of the *Phillips* decision) as their initial rate schedules, and (2) applications for certificates of convenience and necessity for existing service.

Since, under its contracts with Sun and the Sun-Transco contract, petitioner's gas had been sold to Transco on June 7, 1954, petitioner, without admitting that it was subject to the Commission's jurisdiction, filed on October 21, 1954, these contracts and the amendments thereto as its initial rate schedules and also filed on October 25, 1954, an application for a certificate of public convenience and necessity to continue this sale (R. 8–225, 271–281). Thereafter, on April 5, 1955, petitioner, after notifying Sun and Transco that it was exercising its right to make a different disposition of its gas, contracted to sell the gas to Tennessee Gas Transmission Company commencing July 15, 1955 (R. 233–268). On June 13, 1955, petitioner, still not admitting that it was subject to the Commission's jurisdiction, filed with the Commission an amendment

to its certificate application limiting sales to Transco "until July 15, 1955 and not afterwards" (R. 282–283); a notice of withdrawal effective July 15, 1955, of the certificate application (R. 285–290); and a notice of cancellation of petitioner's rate schedule for sales to Transco, also effective July 15, 1955 (R. 226–231). At the same time, petitioner filed an application for a certificate of public convenience and necessity for the proposed sale to Tennessee of the gas previously sold to Transco together with a rate schedule covering this new sale (R. 326–333, 233–268).

By letter dated July 1, 1955, the Commission refused to allow the withdrawal of the certificate application but stated that it would consider it "as a request for authority to abandon service [to Transco] pursuant to Section 7 (b) of the Natural Gas Act" (R. 292). In this connection, the letter noted that petitioner had also applied for authority to sell the gas now sold to Transco to Tennessee and requested the submission of evidence that the present or future public convenience and necessity permitted the requested abandonment of the sale and service to Transco (R. 292–293).

By letter dated July 8, 1955, the Commission further advised that it had accepted petitioner's notice of cancellation of its Transco rate schedule, since petitioner was not a signatory to the basic contract between Sun and Transco, which contract had been filed as a rate schedule by Sun (R. 269–270). The Commission stated that it had "found that it [was] not in the public interest to permit or require duplicate filings of gas sales contracts by parties not signatory

thereto where the same contract has been filed as a rate schedule by a signatory party and where such signatory's rate schedule may be taken as the rate schedule for all producers whose gas is sold thereunder" (R. 269). The Commission also informed petitioner that it had accepted its Tennessee contract for filing "to become effective upon the date of issuance of the certificate of public convenience and necessity covering such sale" (R. 269).

On July 29, 1955, petitioner filed with the Commission an "Application for Rehearing" on the letter orders of July 1, and July 8 (R. 294–320). In addition to attacking the Commission's actions in a number of particular respects, petitioner reiterated its claim that neither it nor any of its sales or facilities were subject to regulation under the Natural Gas Act (see R. 302–304). The Commission, on August 25, explained that it had undertaken to treat the request for withdrawal of the Transco certificate application "for the purpose of expediting this proceeding. In view of your insistence that your pleading entitled 'Notice of Withdrawal' * * * was not intended to be and should not be considered as a petition filed pursuant to Section 7 (b) of the Natural Gas Act, we will not now consider it as such application. However, if the service to [Transco] is to be abandoned, it will be necessary for you to file a petition to abandon such service in accordance with Section 7 (b) of the Natural Gas Act. Rejection of your Notice of Withdrawal is affirmed" (R. 324). As to petitioner's Tennessee certificate application, the Commission advised that "unless and until Commission authoriza-

tion is secured, you may not, under Section 7 of the Natural Gas Act, make such sale" (R. 324–325). Expressing the hope that "the views of the Commission set forth herein clearly point out the pattern which, in our opinion, should be followed" (R. 325), the Commission concluded by advising petitioner that "the above matters will be set for hearing as promptly as possible" (R. 325).

Petitioner thereafter sought review in the Court of Appeals below. That court held that the Commission's letter orders of July 1 and July 8 were not within the class of orders reviewable under Section 19 (b) of the Act, since "they are * * * mere procedural steps taken at the inception of and not upon the completion of the administrative process. All that the Commission did in the exercise of its regulatory jurisdiction was to enter preliminary, interlocutory orders which do not bear upon the merits of the controverted fundamental issues which must ultimately be adjudicated by the Commission." The Court of Appeals went on to point out that petitioner was before it "without a record, without a single established fact or finding, and without evidence, asking us to exercise our power of review when, in fact, there is no 'order' to review. This being the situation, it is plain that petitioner is prematurely seeking review of the Commission's action without having first exhausted the prescribed administrative remedy" (Pet. App. 7a, 8a).[2]

[2] While the case was pending before the court below, the Commission set the application for a certificate to serve Tennessee for hearing on January 4, 1956. The Commission's order on that

ARGUMENT

In company with other petitioners in the current series of independent natural gas producer cases (Nos. 457, 530, 558, 579, 583, 584, and 585), the present petitioner seeks review of procedural and interlocutory orders, without availing itself of the Commission procedures for the adequate determination, on a proper record, of the underlying substantive issues which are really at the heart of the problem. The various interlocutory orders which the petitioners challenge in these cases differ in purpose and effect, but all have been issued by the Commission under the Natural Gas Act in an effort to provide an orderly and expeditious method of hearing and resolving the underlying substantive questions which should be settled speedily and properly. This petitioner, along with the others, seeks to interject judicial review at the very beginning of the administrative process, instead of accepting its appropriate place at the end of the Commission proceeding. But, as in the other cases, there is no merit to the particular reasons given in this case for such an extraordinary reversal of the place and role of judicial review.

1. In claiming that the court below erred in holding unreviewable, under Section 19 (b) of the Natural Gas Act, the Commission's letter orders of July 1 and July 8, 1955, petitioner asserts (Pet. 8–9) that the Commission improperly assigned as a ground for

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application was entered on June 14, 1956, and petitioner filed a petition for review of the Commission's order in the Court of Appeals for the Fifth Circuit. That proceeding is now pending there.

accepting its notice of cancellation of its Transco rate schedule that petitioner was not a signatory to the basic contract between Sun and Transco which Sun had filed as a rate schedule. This action, without more, petitioner claims, had the immediate and definitive effect of permanently fixing at the Sun-Transco level the prices at which petitioner may sell its natural gas, and hence is reviewable under Section 19 (b).

But it is clear that the Commission's action was procedural and had no such effect. The Commission's letter of July 8, 1955, shows that the reason for the action was solely administrative convenience—to avoid duplicate filings of rate schedules—without any intention to affect substantive rights. See *supra*, pp. 5–6. The action was taken in accordance with Section 154.91 (b) of Order No. 174–B, which provides that the filing of rate schedules by independent producers:

> * * * may be made by (1) an operator of one or more wells under co-ownership, (2) an operator where a group of producers are unitized for production and sale, or (3) an operator of a plant processing natural gas and located in the producing area of the gas which it processes and the payments by such operator to the producers represent a percentage of the proceeds of the sale thereof by the operator.

And we have shown in our brief in opposition in *Magnolia Petroleum Co.* v. *Federal Power Commission*, No. 558, this Term,[3] that the various provisions

[3] See, also, the briefs in opposition for the Commission in *Cities Service Gas Producing Company* v. *Federal Power Commission*,

of the Commission's Order No. 174–B, like those of Orders No. 174 and 174–A, are intended solely to provide a simplified procedure whereby independent producers subject to the Commission's jurisdiction under the *Phillips* decision may come into compliance with the Act. Plainly, petitioner's right to initiate rate changes is unaffected by the Commission's action—a right, it may be noted, petitioner has not sought to exercise. The further claim that petitioner is not a "natural gas company" subject to the Act, and may therefore change its rates at will, must be decided in accordance with the appropriate procedure established by the Commission.[4] See the Commission's brief in opposition in *Magnolia Petroleum Company* v. *Federal Power Commission,* No. 558, this Term. Of course, so long as the Transco service is continued, it was necessary, if the sale is subject to the Commission's jurisdiction under the Act, to have on file a rate schedule at which such sale was being made.

2. As for petitioner's attempt to discontinue the Transco sale by filing a notice of withdrawal of the certificate application therefor, the Commission was of the view that the proposed discontinuance might constitute an abandonment of service under Section 7

No. 418, this Term; *Continental Oil Company* v. *Federal Power Commission*, No. 457, this Term, and *Humble Oil and Refining Company* v. *Federal Power Commission*, No. 530, this Term.

[4] Any impact the Commission's action might have upon petitioner is eliminated if petitioner is correct in its insistence that it is not within the class of independent producers subject to regulation under the Natural Gas Act. Only if that issue is resolved against petitioner can the Commission's action have any impact at all upon it.

(b) of the Act, *supra,* p. 5, and undertook to consider the withdrawal notice as an application for authority to abandon. On that matter, the Commission's letter of August 25, *supra,* pp. 6–7, leaves no doubt as to the interlocutory character of the Commission's action; petitioner was expressly advised of "the pattern which, in our opinion, should be followed," *i. e.,* that "if the service to [Transco] is to be abandoned, it will be necessary for you to file a petition to abandon such service in accordance with Section 7 (b) of the Natural Gas Act," which prohibits a natural-gas company from abandoning service subject to the Commission's jurisdiction "without the permission and approval of the Commisson first had and obtained, after due hearing * * *."

As the court below held, such an interlocutory order taken at the inception of the administrative process is not reviewable under Section 19 (b) of the Act. In interpreting the identical review provision of the Federal Power Act (49 Stat. 860, 861), this Court squarely rejected a contention that an order setting a hearing and requiring production of documents in initiating an investigation allegedly beyond the Commission's power was reviewable by a Court of Appeals, since a contrary construction would "afford * * * opportunity for constant delays in the course of the administrative proceeding" and "would do violence to the manifest purpose" of the review provision. ***Federal Power Commission*** v. ***Metropolitan Edison Co.,*** 304 U. S. 375, 383, 384. Allegations of jurisdictional defects and irreparable injuries in that case were held

insufficient to convert an order of a "preliminary character" into one of "definitive character dealing with the merits of a proceeding before the Commission" reviewable under the Federal Power Act (304 U. S. at 384).[5]

This Court, in addition, in its most recent examination of the Natural Gas Act stressed that the procedures authorized by the Act must be viewed as part of a single regulatory scheme providing Commission review and control over natural gas companies subject to the Act. *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U. S. 332. To make this preliminary step in the regulatory procedure the point at which a court may intervene to determine the validity of the order would subvert the regulatory framework established by Congress.

3. Petitioner urges (Pet. 12–14) that its proposal to discontinue the Transco sale was not subject to Section 7 (b) of the Act and apparently seeks to jus-

[5] The Court stated (304 U. S. at 384):

> The context in § 313 (b) [the review provision] indicates the nature of the orders which are subject to review. Upon service of the petition for review, the Commission is to certify and file with the appellate court "a transcript of the record upon which the order complained of was entered." The statute contemplates a case in which the Commission has taken evidence and made findings. Its findings, if supported by evidence, are to be conclusive. The appellate court may order additional evidence to be taken by the Commission and the Commission may thereupon make modified or new findings. *The provision for review thus relates to orders of a definitive character dealing with the merits of a proceeding before the Commission and resulting from a hearing upon evidence and supported by findings appropriate to the case.* [Emphasis added.]

tify on that ground its refusal to permit the Commission to consider its notice of withdrawal as an application for abandonment. But had petitioner permitted the Commission to act as if it had applied for abandonment of its Transco service petitioner would have been free to raise these jurisdictional contentions, as well as others relating to the Act's applicability to it, at the hearing required by Section 7 (b), and to seek judicial review under Section 19 (b) in the event of adverse Commission rulings, as it has done with reference to its Tennessee certificate application. See *supra*, pp. 7–8, fn. 2.[6]

By refusing to follow these procedures, petitioner has failed to exhaust its administrative remedies. Prior holdings of this Court make it clear that petitioner was required to pursue the remedy provided by the Act and the Commission's regulations despite allegations of irreparable injury, and that the Court of Appeals was correct in holding that it could not substitute itself for the agency which Congress had established to make the initial determinations. *Myers* v. *Bethlehem Shipbuilding Co.*, 303 U. S. 41; *Macauley*

[6] See *Federal Power Commission* v. *J. M. Huber Corporation*, 133 F. Supp. 479 (D. N. J.), pending on appeal, No. 11,779 (C. A. 3), another abandonment case, in which the Commission was granted an injunction to prevent a threatened termination of interstate deliveries of gas prior to completion of proceedings under Section 7 (b) of the Natural Gas Act. When the Commission determined that Huber's attempted abandonment was subject to Section 7 (b), and review of the Commission's determination was sought under Section 19 (b) of the Act, the Court of Appeals for the Third Circuit affirmed. *J. M. Huber Corporation* v. *Federal Power Commission*, 236 F. 2d 550 (C. A. 3), petition for certiorari pending, No. 600, this Term.

v. *Waterman Steamship Corp.*, 327 U. S. 540; *Federal Power Commission* v. *Arkansas Power & Light Co.*, 330 U. S. 802; *Aircraft & Diesel Corp.* v. *Hirsch*, 331 U. S. 752; *Securities & Exchange Commission* v. *Otis & Co.*, 338 U. S. 843; *Lichter* v. *United States*, 334 U. S. 742; *Allen* v. *Grand Central Aircraft Co.*, 347 U. S. 535.

Every consideration which led this Court to require exhaustion of administrative remedies in earlier cases involving allegations of irreparable injury, such as *Myers* v. *Bethlehem Shipbuilding, supra,* is present here, militating against a premature and disruptive assumption of jurisdiction by the Court of Appeals. The problems facing the Commission following the *Phillips* decision were vast in scope and complexity, and the questions involved—including the applicability of the Act to individual companies—were peculiarly within the Commission's competence. A uniform, orderly, and expeditious determination of the Act's coverage as to particular companies is essential to give proper effect to this Court's decision, as well as to avoid injustice and inequity to the companies involved. See *Federal Power Commission* v. *Colorado Interstate Gas Co.*, 348 U. S. 492, 501.

The normal necessity for exhausting the administrative remedy is strengthened in this case by the fact that Congress, in Section 19 of the Natural Gas Act, provided a special procedure for obtaining review of Commission orders respecting coverage, and "Section 19 (b) reflects the policy that a party must exhaust its administrative remedies before seeking review."

Federal Power Commission v. *Colorado Interstate Gas Co.*, 348 U. S. 492, 499. See *Federal Power Commission* v. *Pacific Power & Light Co.*, 307 U. S. 156, 159; *Federal Power Commission* v. *Union Producing Co.*, 230 F. 2d 36 (C. A. D. C.), certiorari denied, 351 U. S. 927.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

J. LEE RANKIN,
Solicitor General.
GEORGE COCHRAN DOUB,
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